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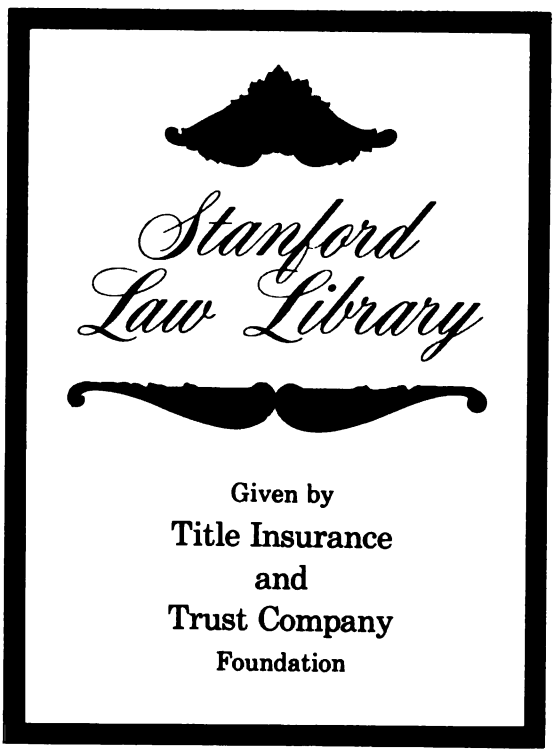
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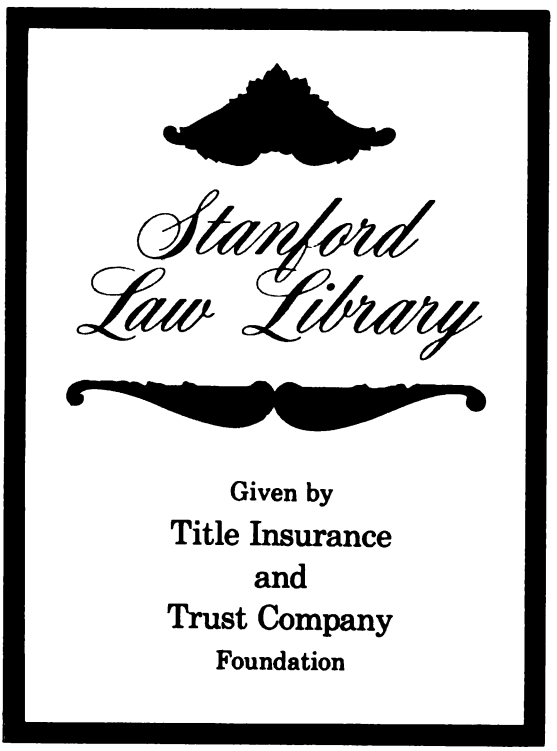
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LAW OF REAL PROPERTY:

CHIEFLY IN RELATION TO CONVEYANCING.

BY

HENRY W. CHALLIS, M.A.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

In its earliest shape this work was prefixed to a work on the Conveyancing and Settled Land Acts, published by the Author in conjunction with his friend Mr. Henry J. Hood. Though it has been so greatly enlarged that it might almost seem to be a new work, its original plan has been retained; and much of the matter contained in the newly-added chapters, is an expanded and completed version of detached remarks upon the same subjects contained in the last edition. The following chapters are entirely novel:—Chapter XI. on the Rules of Limitation at Common Law; Chapter XIII. on the Rule in *Shelley's Case;* Chapter XVI. on the Descent of a Fee Simple; and Chapter XXV. on Concurrent Ownership.

The Author is indebted to his friend Mr. W. R. Sheldon, of Lincoln's Inn, for the General Index at the end of the work.

A good many additional references, chiefly to the serial reports, will be found in the Table of Cases. The new series of the Law Journal Reports and Law Times Reports are cited without any addition. The new series of the Jurist is indicated by the addition of "N. S."

It is hoped that the Report of the Case of *Witham* v. *Vane*, before the House of Lords, which is given in the Appendix, will be found of interest to the profession.

To the attention of any reader who may be inclined to think that these pages are cumbered with an overdose of archaic learning, the Author would commend the lesson to be learned from the Case of *Blake* v. *Hynes*, referred to at p. 227 of this work. That the recondite question there discussed should, after some centuries of oblivion, have emerged into practical importance in the year 1884, affords as striking a confirmation as could be desired of the truth of Lord Coke's remark:—"There is no knowledge, case, or "point in law, seeme it of never so little account, but "will stand our student in stead at one time or other, "and therefore in reading nothing to be pretermitted." (Co. Litt. 9 a.)

In the Preface to his Essay on Estates, Preston speaks of the "incredible labour" which that work had cost him. If the present writer had never attempted to grapple with kindred subjects, he would never have understood the significance of those words. He will, therefore, have the less right to complain, if his readers should skim lightly over his sentences with small thought of the pains it cost to frame them.

2, Stone Buildings, Lincoln's Inn,
1*st February*, 1885.

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LIST OF TEXT-BOOKS CITED.

*** *In the absence of special mention, numbers preceding the name refer to volumes, and numbers following the name refer to pages.*

BACON, USES.
Lord Bacon's Reading upon the Statute of Uses; ed. by Rowe, 1806. The references are to the marginal pages. The corrections of the text in this edition are important, and the explanatory notes are valuable.

BL. COM.
Blackstone's Commentaries; 15th ed. by Christian, 4 vols. 1809.

BOOTH, REAL ACTIONS.
2nd ed. 1811; with Serjeant Hill's notes.

CHANCE ON POWERS.
With Supplement, 2 vols. 1841. This able work appears to have met with undeserved neglect. The present writer's copy obviously belongs to an edition of 1831, with a vamped-up title dated ten years later to match the Supplement.

Co. COP.
Lord Coke's Compleat Copyholder. See his Law Tracts.

Co. LAW TR.
Three Law Tracts: (1) The Compleat Copyholder; (2) A Reading on the Statute *De finibus levatis;* (3) A Treatise of Bail and Mainprize. Ed. by Serj. Hawkins. 1764.

Co. LITT.
Lord Coke's Commentary upon Littleton's Tenures; forming the First Part of his Institutes of the Laws of England; 19th ed. 1832; with notes by Francis Hargrave and Charles Butler; among which are inserted the MS. notes of Lord Hale and Lord Nottingham. This edition is a reprint of the 18th, published in 1823, with some additions to the notes. The former numbering of the notes is preserved, and the additions made thereto are distinguished; but there is nothing to show to which of the annotators each particular addition is due. Mistakes and misprints occurring in the 18th edition, are for the most part reproduced in the 19th.

COM. DIG.
Digest of the Laws of England; by Sir John Comyns, Lord Chief Baron; 5th ed. by Hammond; 8 vols. 8vo. 1822. This edition contains much valuable additional matter; but it is very inconvenient for reference, and some of the titles are displaced. References are to this edition; except at p. 30, l. 7 from bottom, where the reference 1 Com. Dig. 378, which is to the first edition of 1762—1767, has been inadvertently reprinted. The corresponding reference to the 5th ed. is 1 Com. Dig. 618.

CRUISE, FINES AND REC.
Cruise on Fines and Recoveries; 3rd ed. 2 vols. 1794. Cruise made great alterations in the successive editions of this work.

DOCT. & STU.
Doctor and Student, or dialogues between a doctor of divinity and a student in the laws of England. 17th ed. by Wm. Muchall, gent. 1787.

FEARNE, CONT. REM.
Fearne's Essay on Contingent Remainders and Executory Devises; 10th ed. 1844; with Butler's notes. To this edition was added a second volume upon Executory Interests by Mr. Josiah W. Smith. The latter is cited as *Smith on Executory Interests*. The earliest edition of Fearne, edited by Butler, was the 6th. The paging of the 5th ed. is preserved in all the subsequent editions.

FEARNE, POSTH. WORKS.
Fearne's Posthumous Works, 1797; edited by T. M. Shadwell, who had been one of his pupils; see Butl. Pref. to Fearne, Cont. Rem. This contains (1) a reading on the Statute of Inrolments, 27 Hen. 8, c. 16; (2) two arguments, one for each side, in the case of General Stanwix, composed as an amusement, and never delivered or intended to be delivered; and (3) numerous Cases with Fearne's Opinions thereon.

FINCH, LAW.
Law, or a discourse thereof, in four books; by Sir Henry Finch; edited by Danby Pickering, 1759. This is a work of considerable authority, now little read. It fell into disuse after the publication of Blackstone's Commentaries. (Butler's Reminiscences, p. 131.)

FITZH. N. B.
The New Natura Brevium, of Mr. Justice Anthony Fitzherbert. 8th ed. 4to. 1755. Translated from the law French of the text, and the law Latin of the writs, into English. With Lord Hale's Commentary. The references are to the marginal pages, and to the sections into which they are divided by capital letters.

2 INST.
The Second Part of Lord Coke's Institutes of the Laws of England; 2 vols. 1809. A commentary upon certain statutes, from Magna Carta, 9 Hen. 3 to 25 Hen. 8, c. 15. This is commonly called the best edition; but the editing, so far as there is any, is beneath contempt. The same remark applies to the third and fourth parts.

3 INST.
The Third Part of Lord Coke's Institutes. 1809. On pleas of the Crown and criminal offences.

4 INST.
The Fourth Part of Lord Coke's Institutes. 1809. On the jurisdiction of courts.

JARM. WILLS.
Jarman on Wills, 4th ed. 2 vols. 1881.

KITCHIN, JURISDICTIONS.
Jurisdictions, or the Lawful Authority of Courts Leet, &c. By John Kitchin, double reader in Gray's Inn. 5th ed. 1675. On the readers to the Inns of Court, see the Preface to the Third Part of Lord Coke's Reports, p. xxxv of ed. 1826.

MAD. BAR. ANGL.
Madox, Baronia Anglica; fol. 1741. An exhaustive account, as the title page imports, of Honours, land-baronies, and tenure *in capite*.

PERK.
Perkins' Profitable Book; 15th ed. by Greening, 1827. This is the best edition. The references are to the sections.

PREST. ABST.
Preston on Abstracts of Title; 2nd ed. 3 vols. 1823. The present writer chanced once to buy a copy of this work containing numerous MS. notes in the margin, all apparently in the same hand, some signed "R. P." and others "W. S. P." while many have no signature. It is obvious to connect the signed notes with Richard Preston and his son, William Scott Preston. (See Vol. 3, p. v.) Many MS. alterations have also been made in the text, which are evident improvements. On the title page is written "Jeff. Jno. Edwards, 29 Octr. 1827." This writing resembles the writing of the notes, except in being much larger. Edwards was probably one of Preston's pupils. The notes (some of which appear to have been transcribed from a MS. which the transcriber in places could not decipher) are full of tantalising references to "MS. op." and "MSS." with dates, many of the dates being considerably earlier than 1827, which may not improbably refer to Preston's own manuscripts. If any such manuscripts are in existence, it is a great pity that no use should be made of them.

PREST. CONV.
Preston's Treatise on Conveyancing. 3rd ed. 3 vols. 1819, 1825, and 1821, respectively. The third volume treats of the law of merger, and is the only systematic treatise upon that subject known to the present writer.

PREST. EST.
Preston's Essay on Estates; 2nd ed. 2 vols. 1820, 1827. No third volume was published, but the work has no index and seems in other respects to be incomplete.

PREST. SHEP. T.
The additions made by Preston to Sheppard's text, in his edition of the Touchstone, 2 vols. 1820. The pages cited in the references, are the pages of the Touchstone. Where the text itself of the latter work is cited, it is referred to as "Shep. T."

ROB. GAV.
Robinson on Gavelkind and Borough English; 3rd ed. by Wilson. 1822. This is the most masterly treatise ever published upon a detached and limited subject. It exhausts not only the printed authorities, but the unpublished records of gavelkind cases.

SAND. USES.
Sanders on Uses and Trusts; 5th ed. 2 vols. 1844.

SHEP. T.
See PREST. SHEP. T.

SMITH ON EXECUTORY INTERESTS.
An Original View of Executory Interests, by Josiah W. Smith. 1844. Added as vol. 2, to the 10th ed. of Fearne, Cont. Rem. The references are to the pages.

SUGD. POW.
Sugden on Powers, 7th ed. 2 vols. 1845.

VIN. ABR.
General Abridgment of Law and Equity; by Charles Viner; 23 vols. folio. 1742—1753. Viner died in 1756. See Pref. to Bl. Com. On this work, Hargrave expresses the following opinion: "It is indeed a most useful compilation, and would have been infinitely more so, if the author had been less singular and more nice in his arrangement and method, and more studious in avoiding repetitions. These faults, in great measure, proceeded from the author's error of judgment, in attempting to engraft his own very extensive Abridgment on that of Mr. serjeant Rolle, whose work, though most excellent in its kind, and in point of method, succinctness, legal precision, and many other respects, fit to be proposed as an example for other abridgments of law, was by no means calculated for the excessive enlargement from 2 vols. to 23 vols. in folio. It is not to be wondered at, that an incorporation of works so widely different in *proportion* as well as in *execution*, should produce much confusion and disorder in the *effect*. Mr. Viner's labours would probably have advanced his reputation as a compiler much higher, if he had not attempted an union so unnatural." (Harg. n. 3 on Co. Litt. 9 a.)

WATK. COP.
Watkins on Copyholds; 4th ed. by Coventry. 2 vols. 1825. This is incomparably the best book on copyholds ever written, and deserves a new edition. The references are to the pages of this edition.

WATK. DESC.
Watkins on Descents; 3rd ed. by Vidal. 1819. The references are to the pages of this edition.

ADDENDA ET CORRIGENDA.

Page 30, line 7 from bottom, *for* 1 Com. Dig. 378, *read*—1 Com. Dig. 618. (The reference in the text is to the first edition of Comyns.)

,, 37, line 2 from bottom, add *Bishop of Winchester's Case*, or *Wright* v. *Wright*, 2 Rep. 43; Serj. Moore's Rep. 425.

,, 89. The visitorship of a college is suspended during a temporary union of the office with the headship of the college, and revives upon a severance. (*Rex* v. *Bishop of Chester*, 2 Stra. 797.) It seems to follow, that a visitorship might be limited, upon its creation, by way of desultory limitation.

,, 90, last line, *for* 1 East, 452, *read*—1 East, 442.

,, 154. The decision in *Dunn* v. *Flood* has been affirmed on appeal, W. N. 1885, p. 9; but it does not appear that any countenance was given to the opinion of Mr. Justice North, referred to in the text.

,, 174, line 7 from bottom, *for* when, *read*—where.

,, 241, line 5 from bottom. The remark as to the destruction of the contingent remainder must of course be understood subject to the effect of 40 & 41 Vict. c. 33, in case the contingent remainder should have been created subsequently to 2nd August, 1877. See p. 112.

,, 329, line 15 from top—5 Bro. P. C. 247: this reference is to the first edition; the reference to the second edition, by Tomlins, is 6 Bro. P. C. 633. In all other citations of these Reports the references are to the second edition.

,, 343, line 8 from top, *for* 1844 *read*—1824.

THE

LAW OF REAL PROPERTY:

CHIEFLY IN RELATION TO CONVEYANCING.

ERRATUM.

Page 346.—The name of Mr. W. B. Trevelyan should be added to the Counsel for the Appellants.

technicalities, which are undoubted law, and recognized as such by the Courts. Of these technicalities some, being little used in the common practice, only emerge at rare intervals and under extraordinary circumstances from their normal obscurity. But others are of more frequent occurrence, and some are in constant use; nor can the practice of conveyancing be exercised with prudence and safety, or the recent Acts be completely understood, without a thorough knowledge of the whole.

In the absence of express mention, the following remarks will be restricted, so far as they refer to estates, to legal estates of freehold in land, and, so far as they refer to assurances or conveyances, to assurances, other than testamentary dispositions, by which legal estates of freehold in land can be created or transferred.

It is obviously impossible, within the present limits, to enter upon the details of practical conveyancing; but the bulk of the information which is here collected together, has a special bearing upon the work of the conveyancer, as distinguished from that of the pleader and advocate.

Notwithstanding the present decayed state of its general application and importance, some knowledge of the essential characteristics of tenure is necessary to the adequate treatment of the other parts of the subject; nor without such knowledge is a clear apprehension possible of some distinctions which are still of practical importance; such as the distinctions between (1) Rent which is incident to tenure; (2) Rent which is not incident to tenure, but is a tenement, and is capable of being the subject of estates limited by analogy to estates in land; and (3) Rent incident to a reversion.

The whole social and political organization of the kingdom rested upon tenure as its foundation for about four centuries after the Norman Conquest. Its political importance had declined to a shadow of its former self at the end of the reign of Henry VII.; but for another century and a half it continued to flourish in full vigour, as an acknowledged source of legal rights, at all events as between the crown and the tenants of the crown *in capite*, until its operation was interrupted by the abeyance of the royal authority in 1645, followed by the abolition in 1660 of the burdensome incidents attached to tenure *in capite*, by the statute 12 Car. 2, c. 24. The abolition by that statute of the rights enjoyed by the crown in respect to its freehold tenants, is probably the chief cause why the evidence of freehold tenure, in respect to lands holden of private persons, has for a long time been much less carefully preserved than the evidence of copyhold tenure; because thenceforward there was no strong inducement to rebut claims of the crown, arising by presumption in the absence of express evidence. Though the growing importance of the political franchise subsequently gave to freehold tenure, which carried with it the right to vote at the election of knights of the shire, a new political importance, this was in a great measure lost by the passing of the Reform Act of 1832; and even previously to that time the political

privileges attached to freehold tenure did not much favour the careful preservation of the express evidence relating to it, because all tenure is presumed to be freehold unless proved to be copyhold. The decreased practical importance of freehold tenure has led to something like oblivion of its existence; and the word tenure is often used in reference, not to the tenure properly so called, but to the *quantum* of the estate or interest of the tenant.

The practical consequences of tenure, in the proper sense of the word, are now almost confined to (1) rights by escheat, which are seldom claimed, in respect to freeholds, except by the crown; partly because freehold tenure holden of private persons is comparatively rare, and partly because its existence, even when it exists, is difficult to prove; (2) rights of the lord in respect to copyholds of the manor; and (3) rights of the lord on the one hand, and of the commoners on the other, in respect to the waste lands of the manor. The importance of manorial rights, whether of lord or tenant, as distinguished from proprietary rights, has been greatly reduced by the enfranchisement of copyholds and the enclosure of wastes; though some check has been recently imposed upon the latter process. Ancient quit-rents which affect freehold lands held for a fee simple and are undoubted incidents of their tenure, still exist; but these must be at least as old as the year 1290, in which year the statute of *Quia Emptores* made it thenceforward impossible for a subject to reserve a rent as incident to tenure only. They are therefore comparatively rare, and the change in the value of money makes them now of little importance, unless as evidence to support a title by escheat. These also will tend to be extinguished by the operation of sect. 45 of the Conveyancing Act of 1881, which provides, among other things, for the compulsory redemption of quit-rents, at the instance of any person interested in the land.

PART I. ON TENURE.

CHAPTER I.

TENURE BY THE COMMON LAW.

All land is held either mediately or immediately of the king.

BY the doctrine of the common law, all the land in England is either in the hands of the king himself, or is held of him by his tenants *in capite*.* The king is therefore styled, κατ' ἐξοχήν,

* For some purposes it is necessary to distinguish between tenants of the king *ut de coronâ* and *ut de honore*. The former held by direct grant from the king. The latter held of the king only by reason that the land-barony, or Honour, of which they held had come to the king's hand by forfeiture or escheat. They held of the king by the same services as of the barony before it came to the king's hand. See *Mag. Cart.* (9 Hen. 3) cap. 31.

With regard to the inaccurate phrase, *ut de personâ*, which, in Lord Coke's day, was very commonly used instead of the more accurate expression *ut de coronâ*, see Harg. n. 1, on Co. Litt. 77 a; and notes 2, 3, on 108 a.

If a tenant of the king by knight-service, who held *ut de coronâ*, died leaving his heir under age, the king, by virtue of his prerogative, had the wardship both of the lands held of himself and also of any other lands which the tenant held of inferior lords; but if the tenure was *ut de honore*, the king had in general the wardship only of his own lands. (Co. Litt. 77 a.) The duchies of Lancaster and of Cornwall, and some few other Honours, were exceptions from this rule.

As to Honours in general, the curious reader may consult Mad. Bar. Angl. Book I., *passim*. An Honour was the aggregate of a number of manors, usually, and by ancient custom, granted out together under that title by the crown to a great baron; and so long as the English nobility remained of the true feudal type, the tenants for the time being of the principal Honours in the gift of the crown were the chief territorial magnates of the kingdom. Upon the decadence of the feudal system, nobility became a matter of mere titles, unconnected with the tenure of the land, and the meaning of the word "Honour" was almost forgotten. Madox ridicules Henry VIII. for his absurd conduct in passing Acts of Parliament to turn the manors of Ampthill, Hampton Court, and Grafton, into "Honours," at a time when the word no longer retained any of the significance of its original meaning. (Mad. Bar. Angl. 8, 9.)

The king could, of course, if he chose, instead of granting out in its entirety an Honour of which he had obtained possession, subdivide it into aliquot parts, or separate from it some of its manors, or some parcel of its demesne lands; and this was sometimes done even in early times, though not to a great extent, because the practice, if common, would then have disarranged both the political

the Lord Paramount; as being the "sovereigne lord, or lord paramount, either mediate or immediate, of all and every parcell of land within the realme." (Co. Litt. 65 a.) To this rule there is no exception; but Hargrave seems to surmise that allodial lands may still exist in Scotland. In case of a failure of heirs of the person entitled, it would be impossible for a person in possession of land in England to withstand a claim by escheat of the crown, upon a plea that the land was *allodial* or *not held of any lord.* The tenants of the crown *in capite* are commonly referred to as "the tenants *in capite;*" and that phrase imports, in the absence of any addition, tenure holden immediately of the crown, though tenure *in capite* might in fact be holden of a subject. (Co. Litt. 73 a; and see Dy. 277a, pl. 57; Mad. Bar. Angl. 166.) Under the tenants *in capite* came others who held of them; and until the statute of *Quia Emptores* prevented the practice of sub-infeudation from being carried further, the tenants of the tenants *in capite* might, by the common law, convey lands in fee simple to tenants of their own, and these again to others under them, and so on theoretically *ad infinitum,** though in practice the successive links could not be very numerous. After the last-mentioned statute, though successive feoffments in fee might be made, yet the feoffee did

Immediately, by the tenants *in capite.*

Mediately, by tenants of meane lords.

and the military organization of the Kingdom. Some early examples are collected in Mad. Bar. Angl. 44—60. At a later period, when it was no longer attended by the same public inconvenience, the practice became more common. "Thus," says Madox, at p. 59, "land-baronies were divided and subdivided, till at length they were brought to nought." Perhaps the only Honour now held by a subject is the Honour of Arundel, which gives to the Duke of Norfolk his title as Earl of Arundel. For some mention of this Honour, see Mad. Bar. Angl. 63, 71.

* As is shown by the Statute of Westminster 2, 13 Edw. 1, c. 32; which, in order to prevent evasion of the Statutes of Mortmain by means of feigned recoveries, enacted that the *bona fides* of default made by the defendant in actions of recovery brought by ecclesiastical persons should be inquired by a jury; and that, if it should be found that the demandant had a good title, he should have judgment; but if it should be found that he had no right, "the land shall accrue to the next lord of the fee, if he demand it within a year from the time of the inquest taken; and if he do not demand it within the year, it shall accrue to the next lord above, if he do demand it within half a year after the same year; and so *every lord after the next lord* (*quilibet dominus post proximum dominum*) shall have the space of half a year to demand it successively, until it come to the king, to whom at length, through default of other lords, the lands shall accrue." (2 Inst. 428.)

not hold under the feoffment of the feoffor, but, under the statute, of the chief lord of the fee.

Meaning of common law tenure.

The tenure by which this system was held together, because it existed by force of the common law, is often styled tenure by the common law or common law tenure. Since the decadence of the feudal system, which has deprived the true doctrine of tenures of nearly all its practical importance, the word tenure has often been confused with terms referring to the *quantum* of the tenant's estate: a confusion which is chiefly due to the fact, further referred to in the next following paragraph, that common law tenure is found only in connection with estates having a certain conventional *quantum*. But the word properly denotes the *specific feudal relation* subsisting between the lord and the tenant. (See *Att. Gen. of Ontario* v. *Mercer*, 8 App. Cas. 767, at p. 772.)

Does not extend to terms of years.

It refers only to those relations which were comprised within the feudal organization of the realm, and does not properly include the relation between a reversioner and a termor for years. Until the Statute of Gloucester (6 Edw. 1) gave a partial, and the 21 Hen. 8, c. 15, gave a complete, remedy, the reversioner, as common law tenant of the freehold, had power to destroy the term of years at his own will and pleasure, by suffering a collusive recovery. (Co. Litt. 46 a; and see further, as to the origin of terms of years, regarded as legal estates, p. 46, *infra*.)

Connection between common law tenure and freehold estates.

There does not necessarily exist any definite relation between the nature of the *tenure by which* the tenant holds, and the *quantum* of the *estate held by* the tenant; but an invariable custom did, in fact, establish such a definite relation, and also went a considerable way towards maintaining a definite relation between the nature of the tenure and the political status of the tenant. Thus it is the fact (1) that common law tenure was always associated with estates not falling below a certain conventional *quantum;* and (2) that such tenure was so far associated with the status of a free man, that the grant to a villein by his lord of an estate to be held thereby, or (which is the same thing) the grant of an estate not falling below the standard *quantum*, would operate as an enfranchisement. (Litt. sect.

206.) From its connection with political status, the common law tenure acquired the name of *free* or *frank tenure*, and the common law estates were styled estates of *freehold*. These estates remain, in point of *quantum*, the same now as in the days of Littleton; but the practical importance of the distinction between estates of freehold and estates not of freehold, has been much lessened. Moreover, certain important distinctions have been enacted and established by statute, between estates of mere freehold arising under a settlement, and estates of mere freehold taken under a lease granted at a rent.

Both the nomenclature and the history of tenures shows that, so long as the feudal system retained its practical importance, a strong connection existed, both in public opinion and in common practice, between free status and free tenure, and between villein status and villein tenure. It is probable that, during the early period of the Norman conquest, the division between free and villein tenure accurately corresponded with the division of the population in regard to status; but the connection between tenure and status, at all events after the earliest days of the feudal system, was not absolute. (1) A free man did not lose his freedom by accepting lands to be held by villein tenure. (Litt. sects. 172, 174.) (2) Not only the grant of an estate of freehold, but also the grant of a term of years, or any fixed interest whatever, greater than a tenancy at will, by the lord to the villein, operated as an enfranchisement; as also did the grant of an annuity, or the giving of a bond, or anything whereby the villein acquired the right to maintain an action against the lord. (*Ibid.* sects. 205, 208; and Lord Coke's comment.) The existence of these breaks in the connection between tenure and status is sufficiently explained by the leaning *in favorem libertatis*, which has from very early times been a marked feature of English law. (*Angliæ jura in omni casu libertati dant favorem.*)

The connection between frank tenure and free status not absolute.

All free or common law tenure (other than spiritual tenure) was either *in chivalry* or *in socage*. (Litt. sect. 118.) It is necessary to restrict Littleton's words, which are general, to lay tenure; for *frankalmoigne* is indubitably entitled to rank as a distinct third kind of common law tenure. (Co. Litt. 86 a.)

Divisions of common law, or frank, tenure.

Tenure in chivalry.

(I.) Tenure in chivalry comprised, until its abolition in the year 1660 (which took effect as from 1645) by the 12 Car. 2, c. 24, the following species:—

1. *Grand Serjeanty.* (Litt. sects. 153—158, and Lord Coke's comment.) This tenure could be of none but the crown. (Litt. sect. 161.) Its distinguishing characteristic is the nature of the services to be performed by the tenant. These were always of an honourable and dignified kind, closely connected with the person or the service of the king. They might be either merely ornamental, as to carry the king's spurs or sword at his coronation; or useful, as to keep guard in one of the royal castles, or to perform the duties of constable, marshal, or chamberlain of England. (Co. Litt. 105 a, 106 b; Mad. Bar. Angl. 247.) The office of Usher of the Exchequer was held by grand serjeanty. (Dy. 213 b, pl. 42. See also *ibid.* 285 b, pl. 39.) Language has been sometimes used which would seem to import that this tenure has not been destroyed, as a separate species, by 12 Car. 2, c. 24. (For an instance of this, see Lord Ellenborough in *Doe* v. *Huntington*, 4 East, 271, at p. 288.) But the language of the statute better supports the view, that grand serjeanty has thereby been converted into free and common socage, retaining nevertheless its *honorary incidents*.

2. *Homage Ancestral*, on which some remarks will be made shortly. (*Vide infra*, p. 11.)

3. *Knight-service*, commonly so called, of which escuage, cornage, castle-guard, &c., were incidental services. The term *escuage* is sometimes used by metonymy to denote the tenure of which it was a prominent incident; for example, in Litt. sect. 99. *Escuage certain*, *i. e.*, payable to a fixed amount, is sometimes used to denote socage; of which *fixity in the extent of the services lawfully demandable* is the most salient characteristic. (Co. Litt. 87 a.) But when the term is used without any specific addition, it refers to knight-service.

It is unnecessary for the present purpose to make any particular mention of the burdensome incidents of knight-

service, which were abolished, together with that tenure, by the statute 12 Car. 2, c. 24.

(II.) Tenure in socage, also styled free and common socage, comprises :— Tenure in socage.

1. *Petite Serjeanty.* (Litt. sects. 159, 160.) This tenure also can be of none but the crown. (*Ibid.* sect. 161.) Sundry incidents of this tenure have been abolished by the 12 Car. 2, c. 24, but its name seems to remain. (Harg. n. 1 on Co. Litt. 108 b.) On the distinction between grand and petite serjeanty, see Co. Litt. 108 a.
2. *Homage Ancestral in Socage.* (See Litt. sect. 152.) This tenure may be said to have been converted into mere fealty ancestral by the abolition of homage; but the conditions under which homage ancestral, whether in chivalry or in socage, existed, make it very improbable that any specimens survived in practice till the Restoration.
3. *Peculiar species* of socage, distinguished by the association with them of peculiar customs; as for example, *Burgage Tenure* (Litt. sect. 162), distinguished by its frequent connection with the custom of borough-english, and also with a custom to devise by will lands so held, before the first Statute of Wills, 32 Hen. 8, c. 1; also *Gavelkind*, when the word is used to denote the tenure and not the attendant customs. Other species might perhaps be discriminated, which have not acquired distinct names by reason of their rarity and comparative unimportance. But the practice of distinguishing between species of socage or other tenures, by their connection with peculiar customs of inheritance, is of doubtful propriety; because an alteration in the tenure does not effect any alteration in the associated custom. (*Vide infra*, p. 12.)
4. *Common Socage*, so styled generally, in the absence of any special characteristic.

(III.) Frankalmoigne is a species of tenure to which the following conditions are necessary:—(1) that the tenant be an ecclesiastical corporation, whether aggregate or sole; (2) that the grant be made by the words *in liberam* (or *puram*) *eleemosinam*, Tenure in frankal-moigne.

or the Norman or English equivalents. (Co. Litt. 94 b.) But no gift to be held by this tenure can be made, since the statute of *Quia Emptores*, except by the crown. (Litt. sect. 140.) Even a corporation sole would take a continuing estate by the use of the word *frankalmoigne* without words of succession. (Co. Litt. 9 b; *ibid.* 94 b.) Fealty was not due to the lord. (Litt. sect. 135.) But if by escheat the lordship passed to a superior lord (*Ibid.* sect. 141), or if by alienation the lands passed to a new tenant (*Ibid.* sect. 139), fealty became due, and the tenure was converted into socage, even though the new tenant were an ecclesiastical person, for the tenure of frankalmoigne could only subsist between donor and donee. (Litt. sect. 141; 2 Inst. 502.)

No definite or specified services could be reserved to the lord on a gift in frankalmoigne, but a general obligation was implied to say prayers and masses for the souls of him and his heirs. If any definite or specified ecclesiastical service was annexed to the gift, the tenure was not properly frankalmoigne, but by *Divine Service*. (Litt. sect. 137.) Therefore it would be the more strictly correct method to treat frankalmoigne as being only one species or sub-division of *spiritual tenure*, as Lord Coke says the old books did. (Co. Litt. 97 a.) A reservation of a secular service, such as a rent, was void, as being repugnant to the nature of a grant purporting to be made in frankalmoigne. (*Ibid.*)

Estates in frankmarriage.

Frankmarriage (sometimes vaguely coupled with frankalmoigne, and sometimes erroneously styled a tenure) is the name, not of a species of *tenure*, but of a species of *estate;* namely, an estate in special tail given to a man and his wife and the heirs of their two bodies, in consideration of the marriage and of a near blood relationship between the donor and one of the parties to the marriage; which estate has some peculiar characteristics distinguishing it from an estate in special tail not limited upon those particular considerations. (See Co. Litt. 21 b.) Land may be given in frankmarriage as well after the marriage as before. (Dy. 272 b, pl. 32.)

Frankmarriage is a word of limitation sufficient (when the postulated state of the facts actually exists) to confer such an estate in special tail without the word heirs. The fact that old

precedents of deeds, or charters, relating to feoffments purporting to be made in frankmarriage, often contain words of express limitation, may be explained, without supposing that the persons who made the deeds had any doubt as to the sufficiency of the word frankmarriage alone. Their motive may have been, to avoid the necessity for actual proof of the relationship between the parties, in case the deed should be required as evidence of the estate.

At common law, before the statute *De Donis* had given to conditional fees the peculiar characteristics which have caused them to be distinguished as fees tail or estates tail, the estate created by a gift in frankmarriage was a conditional fee.

Homage and fealty.

Homage and *Fealty* were not themselves tenures, but incidents of tenure. Homage was due only in respect of estates of inheritance (Litt. sect. 90); and was almost confined to tenure in chivalry, though it was sometimes found as a rare incident of socage tenure. (*Ibid.* sect. 117.) Fealty not only pertained equally to chivalry and to socage, but by custom also to copyhold and customary tenure, and even to a reversion (Co. Litt. 93 a); and it was due in respect of every estate and interest in land, except a common law tenancy at will; that is, a tenancy at will other than the customary tenancy upon which copyhold tenure depended. But (as above remarked) fealty was not due in respect of lands held in frankalmoigne. It sometimes happened that homage, or fealty, was the sole obligation which the tenant was bound to discharge; of which the best known example is the case of lands held by *homage ancestral*, where the tenant and his ancestors had held the land, either of the same lord and his ancestors or of the same corporation, time out of memory, by homage alone. (Litt. sect. 143; Co. Litt. 102 b.) This tenure tends by its nature rapidly to become extinguished; since it generally requires for its validity a double prescription, one on the side of the lord and the other on the side of the tenant; and Lord Coke doubted whether any specimens of it were still in being at his day. (Co. Litt. 100 b.) It is sometimes mentioned as though it had been a special tenure; but may more properly be regarded as knight-service (in some rare cases, socage) which had never been subject to any other services,

Tenure by homage ancestral.

or perhaps, in some cases, had practically lost the liability to such services by long disuse. Tenure in frankalmoigne (as above remarked) might be converted into socage, with no service incident to it except fealty, either by alienation or by escheat.

Homage now abolished, but fealty remains.

Homage was abolished by 12 Car. 2, c. 24; but fealty remains due, if demanded; though long neglect would, in many cases, make the title, where it exists in inferior lords, difficult to prove in respect of freehold tenure. In the absence of proof that the tenure is of an inferior lord, the tenure is presumed to be of the crown, which presumption carries with it the right to the lands upon an escheat On admittances to copyholds, where the lord's right to fealty is generally indisputable, it is usual expressly to respite the tenant's fealty. But by the custom of some manors, the copyholders are not bound to do fealty. (Litt. sect. 84.)

On gavelkind and borough-english.

Gavelkind (in its usual sense) and *borough-english* are not tenures, but *customary modes of devolution* affecting lands in particular places, by virtue of which the inheritance of them descends differently from the course of descent prescribed by the common law, although the tenure is socage, and the words of limitation used to create the estate are those used to create common law fees. The word *gavelkind* is used, or confused, in three different senses:—(1) To denote the tenure, which is a species of socage having certain peculiar customs connected with it; (2) to denote the several particulars which together make up the custom of Kent; and (3) to denote only the custom of equal partition among males upon a descent. (Rob. Gav. 9.)

Customs of inheritance do not depend upon the tenure.

But it is conceived that the word is not properly used to denote the tenure; for the custom "runs with the land and not with the tenure" (*Ibid.* p. 80; and see pp. 87, 90); and the descent of copyholds subject to the custom is not altered by enfranchisement. (*Ibid.* 92.) A fine (improperly) levied at common law of gavelkind lands in ancient demesne, did not alter the tenure, though remaining unreversed. (Dy. 72 b, pl. 4.) Some later writers seem to use the word gavelkind, in conjunction with the word tenure, to denote the custom—a highly inappropriate combination. In relation to borough-english, the name of the tenure is burgage tenure. The custom of borough-english,

however, is not confined to boroughs, but may exist in manors. (See *Roe* v. *Briggs*, 16 East, 406.)

Gavelkind. Gavelkind is found as a custom most commonly, but not exclusively, in Kent. (Litt. sect. 210, and Lord Coke's comment.) In that county, though the extent of the custom has been curtailed by 31 Hen. 8, c. 3, and other private Acts passed for the disgavelling of particular lands, all lands are still presumed to be gavelkind until the contrary is shown. (Rob. Gav. 54.) The tendency of this rule is gradually to undo the effect of the disgavelling Acts, because lapse of time makes it difficult to prove that specified lands are included in a specified Act.

Properly refers only to the custom of Kent. It seems that the word gavelkind is not properly used of lands affected by the custom outside Kent, such extended usage of the word having been introduced only by the disgavelling Acts of Hen. 8. (Rob. Gav. 8, note.) The custom of Kent must, at all events, from its importance, be regarded as the normal standard of gavelkind, and all variations from it as being separate and peculiar customs.

How it affects descent. By this custom, the descent is among all the sons equally, and in default of sons, to all the daughters equally, and in default of children, to all the brothers equally; the issue of a deceased son, daughter, or brother, who, if living, would have been entitled to partake, being also entitled *per stirpes* to the share of their deceased parent. (*Ibid.* 112, 115.)

How it otherwise affects lands. The custom affects lands subject to it in some other respects besides descent; namely, dower, curtesy, alienation by infants, and escheat, together with other less important points, some of which are now obsolete; and the effect of the disgavelling Acts above referred to is confined to descent alone, so that the custom still applies in all other respects. (Rob. Gav. 96.) The peculiar advantage of gavelkind lands in respect to escheat, has disappeared with the general abolition of escheat upon attainder of felony by 33 & 34 Vict. c. 23.

Borough-english. Borough-english is a custom chiefly found in connection with lands held by burgage tenure within certain ancient boroughs

(Litt. sect. 165); which species of socage does not seem to be affected by 12 Car. 2, c. 24. (Harg. n. 1 on Co. Litt. 116 a.) The descent is here to the *youngest son*, to the exclusion of all the other children. (Litt. sect. 211.) Various species or modifications of the custom, including its extension to females, and also to collateral descents, are also found. The custom also obtains in certain manors. (Rob. Gav. 391, 393.)

Other peculiar customs of descent in socage.

Customs affecting the descent of lands of freehold tenure, such as those above mentioned, are found in considerable variety scattered about the kingdom. It is said, for example, that in the borough of Wareham in Dorsetshire, and in Taunton Dean in Somersetshire, lands descend by custom to both males and females by equal partition. (Rob. Gav. 45.) The same custom held good of lands within the city of Exeter, until, by a private (or rather, local) Act, 23 Eliz. c. 12, lands within that city were made inheritable as lands at the common law. (*Ibid.*) Lord Coke also mentions a manor in Berkshire, in which, if there be no son, the eldest daughter inherits, to the exclusion of her sisters, if any.* (Co. Litt. 140 b.) The tenure of freehold lands within such boroughs and manors may be regarded as forming distinct species of socage, which have never acquired special names by reason of their rare occurrence; but it is the usual practice to regard such peculiarities of local custom as being modifications of gavelkind, if they are associated with a custom of equal partition, and as modifications of borough-english, if they are associated with a custom of descent to the youngest child. The above mentioned custom of the manor in Berkshire cannot be brought under either denomination. Cus-

* Lord Coke's testimony as to the eldest daughter is clear. He then continues —"and if he [the deceased tenant] have no daughters, but sisters, the eldest sister by the custome shall inherit, and sometimes the youngest." These words are obscure. They probably mean, that in the same manor the eldest sister inherits, provided that there are no brothers; and that in some other manors there is a similar custom in favour of the youngest daughter and the youngest sister, in default of sons and brothers respectively. The manor referred to by Lord Coke is no doubt the Manor of Bray; see 2 Watk. Cop. 480. For a curious customary descent of *copyholds* within the manor of Sedgley in the county of Stafford, see *Bickley* v. *Bickley*, L. R. 4 Eq. 216. In this case the word *descent* was held to signify a link in the pedigree, without reference to the question, whether it had, or had not, been the cause of an actual devolution by heirship.

toms like these, including the custom to devise lands before the passing of the Statutes of Wills, which are in derogation from the common law, may be alleged to exist in counties, hundreds, cities, boroughs, honours, and manors, but not in less important places, such as hamlets and towns. (Co. Litt. 110 b, and Harg. n. 2 thereon.) This last remark does not apply to customs favoured by the law, such as a custom to make bye-laws for repairing a church, or for the well-ordering of common lands. (*Ibid.*) The restriction upon the legality of local customs is founded upon the consideration that, if every trifling locality were indulged in the use of special customs, the common law, which is only the general custom of the realm, would practically cease to exist. For an example of a custom (besides the custom of Kent) peculiar to a county, see the custom of the county of Gloucester, referred to in the statute *De Prærogativâ Regis*, cited *infra*, p. 31.

How far such customs are good.

CHAPTER II.

THE STATUTE OF QUIA EMPTORES.

Effects of alienation upon the feudal polity.

By the common law, lands held in fee simple could be alienated, and upon alienation a tenure could, if the parties chose, be created between the feoffor and feoffee. (2 Inst. 65.) Unless the alienation extended to the whole of the lands in the same tenure, the feoffee could not, by the mere act of the parties, be made to hold of the chief lord; because the tenant had no right to divide the lord's seignory without his consent. (Co. Litt. 43 a.) The creation of a sub-tenure in lands held for a fee simple is commonly styled sub-infeudation; and this was the form under which alienation was usually effected during the early stages of the feudal polity. For several generations such alienations were common; and though some restriction was placed upon alienation by Magna Carta, further referred to in the next following paragraph, it is evident from the complaints made by the superior lords, that the practice of creating sub-tenancies and mesne lordships was not seriously checked. We gather from the preamble to the statute of *Quia Emptores*, 18 Edw. 1, that this alienation by the creation of a sub-tenure might deprive the chief lords of the "*escheats*, *marriages* and *wardships* of lands and tenements belonging to their fees." The explanation* of the lords' complaint is possibly as follows:—Though the lord might always at common law distrain upon the whole land for his *services* in arrear (2 Inst. 65), and also, under the Statutes of Gloucester and Westminster 2, might recover the lands by writ of *cessavit*, yet he would lose the benefit of *escheats*, *marriages*, and *wardships*, if his own tenant, having infeoffed a sub-tenant, should simply disappear, so that the

* Blackstone says that the wardships, &c., fell into the hands of the mesne lords. (2 Bl. Com. 91.) There seems to be here some confusion. What the superior lord was entitled to was the wardship of his own tenant, the mesne lord, not of the mesne lord's tenant; and the wardship of the mesne lord could not possibly fall into the mesne lord's hand.

happening of the occasions upon which those benefits arose would not be known; or if, on occasion of the feoffment, no valuable services had been reserved, so that the wardship of the tenant was the unlucrative wardship of a person entitled to nothing but a bare seignory.

Remedy attempted by *Magna Carta*.

Notwithstanding the lord's right at common law to distrain for the services, the latest version of *Magna Carta*, 9 Hen. 3, c. 32, provided an additional protection for him, by forbidding the tenant to alienate more than would leave enough to answer the services. This enactment was probably due to the same motives which afterwards prompted the enactment of *Quia Emptores*. (2 Inst. 66.) The remedy afforded by a common law right of distress, under which chattels might be seized but could not be sold, was very imperfect. The mischief specified in the preamble to *Quia Emptores*, since it sprang rather from the method of sub-infeudation than from the mere passing of the lands into the hands of a new tenant, was appropriately met by removing all restraint from alienation, and at the same time absolutely forbidding the practice of sub-infeudation.

Quia Emptores.

The statute (cap. 1) enacts, "That from henceforth it shall be lawful to every free man to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of *the chief lord* of the same fee *by such service* and customs *as his feoffor* held before." Here the word *customs* means the same as *services*. (2 Inst. 502.)

Apportionment of services on alienation.

The statute (cap. 2) provides for apportionment of the services on alienation of a part only of the lands. But this applies only to services which are in their nature divisible. Of services which do not admit of apportionment, some are due, after alienation, from each tenant; some are due from one only; and some are, and some are not, extinguished on the purchase of a portion of the land by the lord. (*Bruerton's Case*, 6 Rep. 1; *Talbot's Case*, 8 Rep. 104.) The apportionment is to be made according to the value (*pro particulâ secundùm quantitatem valoris*), and not according to the quantity of the land. (2 Inst. 503, 504.)

The statute (cap. 3) extends only to lands held in fee simple.

The statute does not bind the crown.

This statute did not exempt the tenants of the crown *in capite* from the necessity of procuring the king's licence to alienate, because the king's rights, he not being specially named, are not affected by the statute. (Co. Litt. 43 b.) Therefore, (1) if the tenant *in capite* aliened without licence, the crown could distrain for a fine upon the land (Fitz. N. B. 175 A); and, (2) upon such unlicensed alienation, the services were not apportioned, but the crown could distrain upon any of the tenants for the whole services (*Ibid.* 235 A). The king's right to the fine seems to have been derived from *Mag. Cart.* cap. 32. (Co. Litt. 43 b.)

But it seems to bind the tenants *in capite.*

Blackstone seems to have thought that the statute did not extend to the tenants of the crown *in capite*, in the sense that they might subsequently create *de novo* a tenure in fee simple to be holden of themselves. (2 Bl. Com. 91.) But it is perhaps uncertain whether he adverted to the distinction between the different senses which the words "extend to" may bear. The statute has two aspects, one in so far as it enables the tenant to alienate, the other in so far as it disables him from creating *de novo* a tenure in fee simple to be held of himself. The statute did not enable the tenants *in capite* to alienate as against the crown; and in this sense it may be said that the statute did not "extend to" the tenants *in capite*, though it would be more strictly correct to say, that the statute did not extend to the crown. This proposition is, in fact, the import of the passages cited in the last preceding paragraph from Fitzherbert. But it does not follow that the statute did not extend to the tenants *in capite*, meaning thereby that it failed to restrain them from creating *de novo* a tenure in fee simple. The question seems to be at this day of no practical importance; for Blackstone held that in any case the effect of the statutes 17 Edw. 2, *De Prerogativâ Regis*, c. 6, and 34 Edw. 3, c. 15, is to invalidate all sub-infeudations by the tenants *in capite* of later date than the commencement of the reign of Edward I.

How far manors can be created since the statute.

The inference may, perhaps, be too hasty, that "all manors existing at this day must have existed as early as King Edward the first." (2 Bl. Com. 92.) Charters have been granted by the

crown, and confirmed by parliament, empowering subjects to create manors since that date; of which an example is to be found in the case of *Delacherois* v. *Delacherois*, 11 H. L. C. 62. In that case the land to which the charter had reference was in Ireland, and the confirmation was of course by the Irish parliament. There can be no doubt that, if aided by the confirmation of the English or British parliament, a charter authorizing the creation *de novo* of manors in England would be valid. Nor is it at all clear, that such confirmation is necessary. Lord Coke expressly affirms, that the statute may be dispensed with, by consent of the crown and all the mesne lords. (Co. Litt. 98 b; 2 Inst. 501.)

Alienation, how far made free by the statute.

The practical result of the partial restraint upon alienation imposed by *Mag. Cart.* cap. 32, was, that lords exacted a fine upon alienation as the price of their consent, without which their tenants could not make a safe title. The right to such fines was abolished, so far as the tenants of common persons are concerned, by the statute of *Quia Emptores*. But, as above mentioned, the tenants of the crown *in capite* acquired by the statute of *Quia Emptores* no rights as against the crown; and therefore fines upon alienation continued to be due from the tenants *in capite*, until expressly abolished by 12 Car. 2, c. 24.

One effect of the introduction of common recoveries into general practice, was, that the king's tenants *in capite* acquired power to alienate their lands, under pretence of a paramount title in the demandant, without compounding with the crown for fines on alienation. The statute 32 Hen. 8, c. 1, s. 15, accordingly enacted, that fines for alienation should be paid upon obtaining writs of entry for suffering common recoveries. (Cruise, 2 Fines & Rec. 17.)

Effect of the statute.

It is the general effect of the statute of *Quia Emptores*, so often as a mesne tenure for a fee simple is extinguished by union of the land and the lordship in the same hands, to prevent the mesne tenure from being ever again revived by any act of the parties. Thus, by the gradual extinction of the mesne tenures, the seignory of all freehold lands held for a fee simple tends to become concentrated in the crown.

A tenure can still be created, accompanied by a reversion.

A tenure can still be created between donor and donee of lands to be held in tail, or for any less estate of freehold. On a gift in tail, the *reversion in fee remaining in the donor*, the tenure is necessarily between donor and donee, and cannot, even by express *tenendum*, be created between the donee and the superior lord of the donor. But if on a settlement *the whole fee passes out of the settlor*, the tenure, even as regards particular estates carved out of the fee, is executed by the statute in the superior lord. (2 Inst. 505. See also Litt. sect. 215; Perk. sect. 637. To this effect also is the decision in Dy. 362 b, pl. 19.)

CHAPTER III.

THE STATUTE 12 CAR. 2, C. 24.

THIS loosely-drawn statute, like the Statute of Frauds, is plausibly ascribed to Lord Hale—a report which Hargrave would willingly discredit. (Harg. n. 1 on Co. Litt. 108 a.) Its language is marked by an iteration, always inept and sometimes perversely maladroit, which is a surprising feature of such authorship. By it (1) the Court of Wards and Liveries is abolished, and the burdensome incidents of knight-service and of socage *in capite*, including fines for alienations, are discharged as from 24th February, 1645, since which date the Court of Wards and Liveries had ceased to hold sittings; (2) all tenures, whether of the king or of any person or corporation, are turned into free and common socage as from the same day; (3) all conveyances and devises of any hereditaments made since the same day are to be expounded as if the same hereditaments had been then held in free and common socage; (4) certain statutes passed for the establishment and regulation of the abolished court are repealed; (5) all tenures thenceforward to be created are to be and to be adjudged free and common socage only. (Sects. 1—4.)

Burdensome incidents of tenure in chivalry and *in capite* abolished.

The savings out of the Act require more particular mention.

Savings.

1. The Act does not take away rents certain, heriots or suits of court belonging or incident to any former tenure now taken away or altered by virtue of this Act, or other services incident to tenure in common socage, or the fealty and distresses incident thereunto. (Sect. 5.)
2. The Act does not take away fines for alienation due by particular customs of particular manors and places, other than fines for alienation of lands or tenements holden immediately of the king *in capite*. (Sect. 6.)

3. The Act does not take away tenures in frankalmoigne, or subject them to any greater or other services than they then were subject to; nor does it alter or change any tenure by copy of court-roll or any services incident thereunto; nor does it take away the *honorary services* of grand serjeanty. (Sect. 7.) But there is no saving of the last-mentioned *tenure*.
4. Nothing in the Act is to infringe or hurt any title of honour, feudal or other, by which any person hath or may have right to sit in the Lords' House of Parliament, as to his or their title of honour or sitting in parliament, and the privilege belonging to them as peers. (Sect. 10.)

Effect of the statute on the right to devise.

By the conversion of all lay frank-tenements into socage tenements, it followed that every freehold tenant acquired the right to devise all lands held by him for a fee simple, which right had been given by the Statutes of Wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5, only partially to tenants by knight-service, but completely to tenants in socage.

It seems clear that, since the passing of this statute, no lay frank-tenure other than socage can be created, even by the crown, without the assent and confirmation of parliament.

CHAPTER IV.

TENURE BY CUSTOM OF THE MANOR (COPYHOLD TENURE).

Origin of customary tenure.

CUSTOMARY tenure may be said to exist by virtue of the common law, in a sense which is applicable to all matters which the common law does not forbid to exist; but this merely permissive sense is evidently opposed to the active sense in which common law tenure is said to exist by virtue of the common law. The analogous active cause of the existence of customary tenure is local custom; and particularly those local customs which regulated the terms upon which villein tenants were permitted to hold land. Thus Littleton says, that "tenure in villenage is most properly when a villein holdeth of his lord, to whom he is a villein, certain lands or tenements according to the custom of the manor, or otherwise, at the will of the lord, and to do to his lord villein service." (Litt. sect. 172.) It does, indeed, also appear from Littleton's language, that lands not parcel of any manor belonging to the lord of whom they were held, might be held in something called villenage; and by a tenant who was not the lord's villein, or not a villein at all, but a free man. But for all practical purposes copyhold tenure not only does now, but probably always did, exhaust the whole extent of villein tenure or tenure in villenage; and originally the villein tenants throughout the kingdom were probably conterminous with the villeins by status.* Villein tenure, if it was ever accepted by

* It is a remarkable circumstance, which seems to have passed without remark, that in his commentary on Litt. sect. 73, Lord Coke cites the words "certaine *tenements*," as though they were the words of Littleton. Littleton's words, as translated by Lord Coke, are, "certaine *tenants*." What follows shows plainly that the substitution was not due to a clerical error. Littleton connects the tenure with *status*. To Lord Coke this idea was so unfamiliar, that he unconsciously substitutes a phrase which connects it with the *particular lands* habitually demised by the custom; and he proceeds, accordingly, to discuss *what things* are so demisable. This fact, perhaps, points to a change in the way of viewing this kind of tenure. Originally, copyholds may have been any lands held by the villeins; and afterwards the characteristics of the tenure became attached to the particular lands which were usually so held.

free men of lands not parcel of the manor, would differ from villein tenure by custom of the manor in two important respects: (1) that the grant was not made or evidenced by copy of court roll; (2) that there existed no custom to prevent the lord from asserting his right at common law to eject the tenant, who was only his tenant at will, whenever he would. So far as such a relation between lord and tenant ever existed, it could have been nothing more than a contract for hiring, determinable at the will of either party (the tenant by hypothesis not being the villein of the lord), which can be termed a tenure only by vague analogy to the true villein tenure by custom of the manor, with which it shared two prominent characteristics:—(1) that the estate, or interest, to which it related was only a tenancy at will; and (2) that the services due in respect thereof were of a kind conventionally reputed to be below the dignity of a free man. But from early times it has been no unknown thing for free men to accept a tenancy of copyholds; and it is long since any notion of villein status has been socially attached to this tenure.

Its characteristics.

Copyhold tenure is distinguished by the following characteristics:—

1. The estates to which it relates are *legal* estates, *i. e.* the custom of the manor is, and for centuries has been, recognized by the courts, even of law, as conferring a right, though the tenure is not by common law, and the estate is not freehold. This recognition may be traced very high in the history of England, perhaps almost to the Norman Conquest. (See Litt. sect. 77, and Lord Coke's comment.)
2. The *quantum* and mode of *devolution* of the tenant's estate are governed by the custom of the particular manor of which the lands are parcel; but generally the custom follows the common law; so that (1) the utmost *quantum* of the estate is generally equal in *quantum* to a fee simple, and it admits, to the same extent as a fee simple, of being cut up into *particular* estates followed by *remainders;* and (2) the *customary heir* is generally identical with the heir-at-law. In spite of the difficulty, or

impossibility, of seeing how, when the law presumes every custom to have been in existence at the beginning of the reign of Richard I., a custom to intail copyholds can have sprung up since the statute *De Donis*,* it is settled law that a custom to intail copyholds may exist and is a good custom. Entails of copyholds of manors in which there is no custom to intail, give rise to customary conditional fees, which are analogous to conditional fees at common law.

Entails of copyholds.

3. The legal estate is acquired by *admittance;* the title to admittance being acquired by surrender according to the custom (generally into the lord's hands) to the use of the surrenderee. But an admittance made upon and subsequently to a valid surrender, relates back to the time of the surrender, and displaces all estates created or attempted to be created by the surrenderor subsequently to the surrender. (*Benson* v. *Scott*, 4 Mod. 251; Carth. 275; 3 Lev. 385.)
4. Copyholds held for a customary fee simple, escheat to the lord on a failure of heirs of the tenant, in a manner analogous to the escheat of common law lands. And curtesy and dower are commonly allowed by the custom to the surviving husband and wife respectively; but frequently with a variation from the common law custom as regards the quantity of land assigned and the conditions on which it is held. Dower out of customary inheritances is usually styled *free-bench.*
5. If copyholds come to the lord's hands by forfeiture or escheat, he may keep them in hand for any length of time without prejudice to his power of granting them by copy. (Co. Litt. 58 b.) But if he should once grant them by any other kind of assurance, the copyhold tenure is for ever destroyed and incapable of being restored.

As we have seen, this tenure and all services incident thereto are expressly saved by the 12 Car. 2, c. 24.

* See the argument of Sir Roger Manwood, in *Heydon's Case*, 3 Rep. 7, at p. 8 b; referred to in the chapter on fees tail, *infra.*

CHAPTER V.

TENURE BY THE CUSTOM OF ANCIENT DEMESNE (CUSTOMARY FREEHOLDS).

Origin of the custom.

In some manors, chiefly, though it seems not exclusively, those of ancient demesne (*de antiquo dominico*), copyhold tenure is found under a peculiar form: some of the tenants holding only by copy of the court roll, and being expressed to hold by the custom of the manor, but not *at the will of the lord*. The manors so styled are those mentioned in Domesday as being in the hands of Edward the Confessor, or William the Conqueror (2 Inst. 542; 4 Inst. 269); and they are reputed by the law to be ancient patrimonial possessions of the crown, which were properly kept in the king's own hands, while other manors and honours, when by escheat or forfeiture they came to the crown, were usually after no long time granted out to a new tenant. This general course of proceeding was established by the necessity of keeping the military fiefs full, in order that provision might be made for the military defence of the crown and kingdom. The copyholders of these manors had several special privileges (4 Inst. 269), now obsolete; and the omission from their grants of the declaration, usual in grants of copyholds, that their tenancy is at the will of the lord, gives to their customary inheritances an air of greater dignity, though not of greater security, than is possessed by ordinary copyholds. The lands are usually styled *customary freeholds*, and the interest of the tenant is often styled *tenant right*. Lord Coke seems to have thought that they were actually freeholds. (Co. Cop. sect. 32 = Co. Law Tr. p. 58; and see also Co. Litt. 49 a; *ibid.* 59 b; 5 Rep. 84 b.) But they share with ordinary copyholds their essential characteristics: (1) existing by force of custom and not by force of the common law; and (2) needing admittance by the lord in order to acquire the legal estate.

The tenure is essentially copyhold.

As previously shown, no land in England, not being in the king's hands, can be without a common law tenant of the freehold. It is almost superfluous to say that, in the case of ordinary copyholds, the common law tenant is the lord, and the common law seisin is in him. (See Litt. sect. 81; the second resolution in *Keen* v. *Kirby*, 1 Mod. 199; also *Lovell* v. *Lovell*, 3 Atk. 11, at p. 12.) Besides Lord Coke, several of the older writers have doubted, or denied, the application of the same doctrine to customary freeholds. (See Kitchin, Jurisdictions, 5th ed. p. 159; 2 Vent. 141; Carth. 432; Ambl. 301; 1 Atk. 474.) But it seems now to be settled beyond doubt, that customary freeholds are essentially copyholds, and that of them the seisin is in the lord. Lord Coke's observation, in the above-cited passage, that "these kind of copyholders have the frank-tenure in them, and it is not in their lords, as in case of copyholds in base-tenure," is explained by Blackstone as referring to the *interest* of the tenant in the land, and not to the *tenure*. (Bl. Law Tracts, 3rd ed. 228.) And, after remarking that the word *freehold* is often used ambiguously to denote sometimes the duration of the interest, and sometimes the tenure, he adds the unanswerable argument, that the tenure in question, since it undoubtedly continues to exist, must be one of the three following: free and common socage, frankalmoigne, or copyhold; all others having been destroyed by the 12 Car. 2, c. 24. The difficulty of supposing it to be either of the two first-mentioned tenures is obvious. (*Ibid.* 236; and see *Stephenson* v. *Hill*, 3 Burr. 1273; *Burrell* v. *Dodd*, 3 Bos. & P. 378; *Doe* v. *Huntington*, 4 East, 271; *Roe* v. *Vernon*, 5 East, 51; *Doe* v. *Danvers*, 7 East, 299; *Brown* v. *Rawlins*, 7 East, 409.)

And the common law seisin is in the lord.

The publication of Blackstone's tract was shortly followed by the passing of the statute 31 Geo. 2, c. 14, which gave practical effect to his conclusions, by enacting that no person holding by copy of court-roll should be entitled to vote at the election of knights of the shire.

The true criterion between *copyhold* and *freehold* seems to lie in the necessity for *admittance* by the lord in order to gain the legal estate. (*Thompson* v. *Hardinge*, 1 C. B. 940; and the cases there cited. See also 11 H. L. C. at p. 83.)

The question is not without practical importance, because, if the customary freeholder's estate is not "freehold" within the meaning of sect. 62 of the Conveyancing Act of 1881, he cannot create easements by way of use under that section. The Act contains nothing to make such lands freehold by statute, if they are not freehold by common law.

CHAPTER VI.

ESCHEAT.

A FEE simple, the greatest estate known to the law, absolutely exhausts the whole possible interest which anybody can have, by way of estate, in the lands, so as to leave no residue (nor even a mere *possibility of reverter*, such as may subsist at common law upon other fees) subsisting in anybody else, or susceptible of enlargement, or of a change from expectancy into possession, by the determination of the fee simple. The lord is the only person with whom the tenant, as such, has any connection; and the only connection between them is the tenure. Is peculiar to a fee simple.

This link confers on the lord a peculiar right or title, said to be *by escheat*, upon a failure (whether actual, or by construction of law) of the heirs of the tenant; upon the happening of which event, he becomes entitled to the land as his escheat. The word escheat has long been restricted to denote this reverter of lands held for a fee simple to the next superior lord *propter defectum tenentis*.

The fact that all tenures in fee simple created by private persons must be older than *Quia Emptores*, and the general negligence in preserving evidence of freehold tenure, make the proof of the title in private persons difficult at the present day. In the absence of any other claimant, the title is of course in the crown.

Escheats were either by attainder or without attainder. (Co. Litt. 13 a; *ibid.* 92 b.) Escheats by attainder are often also styled forfeitures; but the use of this appellation is inconvenient, since it tends to confuse escheats properly so called with forfeitures properly so called, which latter were for high treason.

Escheat by attainder was a consequence of the corruption of blood caused by the attainder, which caused a constructive failure of heirs. These escheats are subdivided as follows:— Escheat by attainder.

(1) *Quia suspensus est per collum*, or by judgment of death

(which took effect by attainder before and irrespective of the execution) for felony. The writ of escheat contained the words even when the sentence had not in fact been executed. (Fitzh. N. B. 144 H.) This cause of escheat was abolished by 33 & 34 Vict. c. 23, s. 1. It never applied to gavelkind lands subject to the custom of Kent.* The exemption was not restricted to cases where the heir was the son. (See Rob. Gav. 291.) Nor was it absolutely restricted to gavelkind lands in Kent, though it seems to have been very rarely found elsewhere.

The judgment required to cause escheat was a regular judgment at common law: judgment of death passed by a court martial during a rebellion caused no escheat. (Co. Litt. 13 a.)

(2) *Quia abjuravit regnum;* this abjuration was a privilege allowed upon a claim of *sanctuary*, to escape conviction, which implied a confession of felony, and had the same effect, so far as escheat is concerned, as judgment upon conviction. (3 Inst. 217.) This kind of abjuration has long since been abolished. (4 Bl. Com. 333.)

(3) *Quia utlegatus est;* or by judgment of outlawry upon an indictment of (capital) felony, which had the same effect, in all respects, as judgment upon conviction. (3 Inst. 212.) If the outlawry was reversed, the tenant might re-enter upon the escheated lands. Escheat as a consequence of outlawry seems not to be affected by 33 & 34 Vict. c. 23.

Ann jour et wast.

The right of the lord on an escheat by attainder was subject to the crown's right to hold the lands for a year and a day, committing waste; or, according to some opinions, receiving the rents and profits for a year and a day, in lieu of a right at common law to enter and commit waste. (1 Com. Dig. 378; 22 Vin. Abr. 550 = *Year, Day, and Waste;* 2 Inst. 36; 3 Inst. 111; 4 Bl. Com. 385, 386). For many centuries the right, whatever it was, was always compounded for by the lord with the crown; and its precise details are now immaterial. It appears by the statute

* "For their custom is, '*The father to the bough, the son to the plough.*'" (1 Doct. & Stu. c. 10; *Brook* v. *Ward*, Dy. 310 b, pl. 81.)

De Prerogativâ Regis, 17 Edw. 2, st. 1, c. 16, that by the custom of the county of Gloucester, the king had his year and day, but that there was no escheat to the lord, and the lands descended to the felon's heir upon the expiration of the year and day. By the custom of Kent there was neither the year and day nor, as above mentioned, any escheat upon attainder of felony; but the custom was construed strictly, and did not apply either to abjuration or outlawry. (Rob. Gav. 289, 290.)

Custom of Gloucester.

Escheats without attainder are:—

(4) By death without leaving an heir; that is, when the heir cannot be discovered; or when, on the death without issue of a bastard (who can only have taken by purchase) the heir is known not to exist.

Escheat for actual failure of heirs.

If a tenant in fee simple dies without an heir, but leaving his wife *enceinte*, the lord may enter for an escheat; but the subsequent birth of an heir will defeat the lord's claim. (Watk. Desc. 212.) The lord is entitled to the mesne profits.

Since lands held for a fee simple have been deviseable, this right by escheat has been liable to be defeated by devise.

The right by escheat arises only upon a failure of *heirs*. If a *corporation* holding lands in fee simple is dissolved, there is no escheat to the lord, but a reverter to the donor. (10 Vin. Abr. 139 = *Escheat*, A, pl. 2, 3, 4; Co. Litt. 13 b. But see also Harg. n. 2 thereon.) The question is not at this day of much practical importance; because the only dissolutions of corporations which frequently occur, are due to the winding up of companies formed under the Companies' Acts, and in such cases the destination of their property is regulated by the Acts. The reader will also remember that, upon the dissolution of the monasteries and clerical colleges in the reign of Henry VIII., their lands were vested in the crown by statute, where they had not previously been surrendered.

No escheat upon dissolution of corporation.

Until 27th June, 1834, the date of the passing of 4 & 5 Will. 4, c. 23, lands held upon trust or mortgage would have escheated upon the attainder or death without heirs of a sole trustee or mortgagee seised in fee simple; and, according

Trusts and equities of redemption formerly destroyed by escheat of the legal estate.

to the better opinion, the lord coming in by escheat would not have been bound by the trust. (1 Prest. Abst. 147.)

This inconvenience was remedied by the last-mentioned statute, which was repealed by the Trustee Act, 1850, 13 & 14 Vict. c. 60, s. 1; but re-enacted with variations by ss. 15, 46.

Now, by virtue of sect. 30 of the Conveyancing Act of 1881, lands, of which a trustee is solely seised in fee simple, upon his death, notwithstanding any testamentary disposition, become vested in his personal representatives.

Forfeiture for High Treason.

Distinguished from escheat.

Escheat must not be confused with forfeiture to the crown for high treason. Of lands held for any common law fee, such forfeiture was by the common law (3 Inst. 18, 19); and in the case of a conditional fee, after birth of issue of the kind prescribed in the limitation, the forfeiture was absolute and barred the lord of his reverter. The forfeiture related back to the time when the offence had been committed. (*Pimb's Case*, Serj. Moore's Rep. 196.) Forfeiture for high treason extended to gavelkind lands. (Rob. Gav. 293.) After the statute *De Donis*, by which conditional fees were turned to fees tail, the forfeiture incurred by the high treason of a tenant in tail was only during the lifetime of the attainted traitor. (Co. Litt. 392 b; 2 Bl. Com. 116.) The 26 Hen. 8, c. 13, s. 5, partly restored the rights possessed by the crown, before the statute *De Donis*, in respect of lands held for a conditional fee, after the birth of issue of the kind prescribed in the limitation. Thereby it was enacted that every offender lawfully convicted of high treason should forfeit to the king all lands, tenements and hereditaments, which such offender should have of *any estate of inheritance* in use or possession. It was held that the words in italics include fees tail; and that the crown took, by virtue of the statute, a base fee, which endured so long as any issue was in existence which might have inherited under the entail. Forfeiture for high treason was restricted to the lifetime of the attainted traitor, by 54 Geo. 3, c. 145, and was altogether abolished by 33 & 34 Vict. c. 23, s. 1.

The Relation of Escheat to Incorporeal Hereditaments and Equitable Estates.

An attempt has recently been made by statute, to extend the application of the rules of escheat to incorporeal hereditaments and equitable estates. Some remarks upon this enactment, which is expressed to refer only to persons dying intestate after 14th August, 1884, will be found below. Its meaning does not seem to be so clear, as to render superfluous all statement of the previous law.

Legal hereditaments which are not subjects of tenure.

Hereditaments which may be held for a fee simple, but are not strictly subjects of tenure, such as fairs, markets, commons in gross, rents-charge, rents seck, and the like, do not escheat, but become extinct upon a failure of heirs of the tenant. (3 Inst. 21.)

Equitable hereditaments.

If a trustee is seised in fee simple upon trust for another person in fee simple, who dies intestate and without heirs, there is no escheat of the equitable estate, but the trustee holds the lands to his own use. (*Burgess* v. *Wheate*, 1 W. Bl. 123, 1 Eden, 177; *Cox* v. *Parker*, 22 Beav. 168; *Johnstone* v. *Hamilton*, 5 Giff. 30.) The rule is the same for copyholds as for freeholds. (*Taylor* v. *Haygarth*, 14 Sim. 8.) Also for realty which is created by statute, such as New River shares. (*Davall* v. *New River Co.*, 3 De G. & Sm. 394.) In the case of copyholds, if the trustee has not been admitted, a court of equity will not interfere to compel the lord to admit him. (*Williams* v. *Lord Lonsdale*, 3 Ves. 752.) But the trustee has a right to a *mandamus* at law; and there is no equity to interfere with his legal right. (*Rex* v. *Coggan*, 6 East, 431; *Gallard* v. *Hawkins*, 27 Ch. D. 298.) In *Gallard* v. *Hawkins*, the deceased *cestui que trust* was entitled only for life; but the trusts subsequent to the life estate were void under the Charitable Trusts Act, 9 Geo. 2, c. 36, and the deceased settlor had left no heir to take advantage of the resulting trust in his favour.

PART II. ON ESTATES IN GENERAL.

CHAPTER VII.

OF THE SUBJECTS IN WHICH ESTATES MAY SUBSIST.

Division into lands, tenements and hereditaments.

THE subjects in which estates may subsist are commonly subdivided into *lands*, *tenements*, and *hereditaments*; which is a cross division, of which the sub-classes are by no means mutually exclusive. Lands are treated as a separate class, by reason of their prominent importance and peculiar physical characteristics. Tenements require special mention, because they alone are intailable. Hereditaments is a convenient class-name for uniting together everything which may be the subject of estates of inheritance.

Land.

Land includes whatever is parcel of the terrestrial globe, or is permanently affixed to any such parcel. (Co. Litt. 4 a—6 a.)

This is the meaning of the word in ordinary legal speech, and in this sense propositions respecting lands are generally to be understood. (See Co. Litt. 4 a.) For the present purpose, which is only concerned with classification, and is only concerned with that in order to clearness, there is no need to inquire into the more extensive meanings which, in a deed or testament, the word may derive from the context.* But it is to be observed that, by virtue of Lord Brougham's Act, 13 & 14 Vict. c. 21,

* Even in a will, the word "lands" will not include an advowson in gross. (*Westfaling* v. *Westfaling*, 3 Atk. 460.) And it is doubtful whether the word will include a manor, when the testator has other lands, not parcel of the manor, which can pass by the devise. (*Haslewood* v. *Pope*, 3 P. Wms. 322.) But of course a testator may, by express declaration, or by the use of language which suggests a clear inference, import into the word "land," or into any other word, any meaning which he may think proper.

s. 4, in Acts of Parliament the word "land" now includes "messuages, tenements, and hereditaments, houses and buildings, of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure." Here the word *hereditaments* does not seem to include *incorporeal hereditaments*. (Dart, V. & P. 206, n. z.) Sundry curious meanings have also been affixed to the word "land" by special interpretation clauses contained in particular Acts; but these meanings are confined to the particular Acts which they serve to illustrate or obscure.

Estates in land, though not the only estates known to the law, were the earliest in origin, have always been the most common, and have supplied the model for all the rest, which otherwise would never have existed. The tenure of the earliest incorporeal hereditaments, namely, baronies and seignories of manors, as distinguished from seignories in gross, was for several generations inseparably connected with the tenure of land.

Tenements.

Tenement is properly defined to include whatever can be the subject of common law tenure. ("Wherein a man hath any frank-tenement, and whereof he is seised *ut de libero tenemento*." Co. Litt. 6 a.)

The meaning which the word actually bears is wider than that strictly contained in this definition. (Co. Litt. 19 b, 20 a.) The definition would strictly include only lands, such incorporeal hereditaments (seignories, peerages and dignities held by grand serjeanty) as are undoubtedly subjects of common law tenure, advowsons in gross (Co. Litt. 85 a), and perhaps chief rents. But the word "tenement" is in practice, with less obvious propriety, extended to include also rents-charge, commons in gross, estovers and other profits *à prendre*, owing to their close connection with the land; also offices annexed to or exercisable within or over any lands or tenements, as the office of steward or bailiff of a manor, or ranger of a forest. It was also extended to include tithes in the hands of lay impropriators, see *Rex* v. *Shingle*, 1 Eag. & Y. 738, 1 Stra. 100; *Rex* v. *Ellis*, 3 Eag. & Y. 776, 3 Price, 323; though by the common law these could not be in the hands of a lay person. (*Sherwood* v. *Winchcombe*, Cro. Eliz. 293.) And it is the general rule, that all hereditaments

which *savour of the land* or *realty*, are so far accounted tenements in law as to be intailable by virtue of the statute *De Donis*.

A thing may be a tenement for one purpose, and not for another.

It is material to observe, that a thing may be a tenement for one purpose, and not a tenement for another purpose; for example, a rent-charge is undoubtedly a tenement for the purpose of entail, but is not a tenement for the purpose of escheat. (*Vide supra*, p. 33.) As to what are tenements within the meaning of 8 Hen. 6, c. 7, relating to the qualification of county voters, see *Dodds* v. *Thompson*, L. R. 1 C. P. 133; *Dawson* v. *Robins*, 2 C. P. D. 38.)

Hereditaments.

Hereditament includes whatever upon the death of the owner passes (apart from testamentary disposition) to the heir by *hereditary succession*. (Co. Litt. 6 a.) The word *hereditary* excludes *special occupancy*.

Land regarded as a hereditament stands in a peculiar position, because its existence is wholly independent of the manner in which estates in it are limited, while other hereditaments can only by a metaphor be said to have any existence apart from their limitation for estates of inheritance. The word *hereditament*, when used in relation to land, sometimes denotes the land itself as a physical object, and sometimes the estate in the land. The use of a single name to denote two such disparate ideas, is not without inconvenience; but the practice is now inveterate.

Thus, with some degree of confusion, it is commonly said that land is both a tenement and a hereditament. Here it is evident that the word tenement is not used in exactly the same sense, as when a legal estate for life is styled a tenement; and that the word hereditament is not used in exactly the same sense, as when a rent-charge in fee simple is styled a hereditament. In the case of land, the estate contemplated is the legal fee simple; and since this exhausts the whole possible interest, by way of estate, in the land, and since, for most purposes, it matters little whether we speak of the land itself, or of the utmost possible interest in the land, some degree of obscurity is often permitted to exist as to which precisely of these two things is meant to be the subject of reference. The word has, to some

extent, a double meaning. In other cases, in which *the thing* has no real existence apart from the *estate in the thing*, the words used have only a single meaning.

It will easily be perceived that some tenements are not hereditaments, and that some hereditaments are not tenements.

Division of hereditaments.

Hereditaments are commonly divided (1) into *real*, *mixed* and *personal*; and (2) into *corporeal* and *incorporeal*.

The phrase *hereditaments real* (or real hereditaments) is commonly used to denote lands regarded as a physical object, and legal estates of inheritance in lands, whether in possession, remainder or reversion.

The phrase *hereditaments mixed* (or mixed hereditaments) includes all estates of inheritance which, as the phrase goes, *savour of the realty*, being—

(1) Equitable* estates of inheritance in land; with which may also be classed equities of redemption of estates of inheritance, whether legal or equitable;

(2) Territorial baronies, or peerages titular of a place;† with which may also be classed seignories of manors and seignories in gross;

(3) Estates of inheritance in offices‡ of trust or dignity to be exercised within or in relation to lands, such as the stewardship of a manor, or the rangership of a forest;

* It is conceived that now, since the Judicature Acts, equitable estates are hereditaments to all intents and purposes. Previously, they could not be called hereditaments at *law*. (1 Rep. 121 b; see also 3 Rep. 2 b, 3 a.) The same remark seems also to apply to equities of redemption of estates in fee. Being hereditaments, they seem to savour of the realty. The equity of redemption of an estate of inheritance, whether legal or equitable, can be intailed.

† "When the king created an earl of such a county or other place, to hold that dignity to him and his heires, this dignity is personall, and also concerneth lands and tenements." (Co. Litt. 2 a.) And, therefore, such dignities may be intailed; though only by the act of the crown. (*Ibid.* 20 a.)

‡ It must not be assumed, because these kinds of offices may exist, that therefore anybody can create them or transfer them when created, or that new kinds of a sort unknown to the law can be invented at pleasure. "An ancient office must be granted, as it hath been accustomed." (4 Inst. 87; see also Co. Litt. 233 a *et seq.*) A steward of a manor may be appointed by parol. (Dy. 248 a, pl. 79.)

with which may also be classed advowsons in gross, when held for a fee, and certain royal franchises;

(4) Estates of inheritance in certain other royal franchises, also rents-charge, commons in gross, and profits *à prendre*, which imply some participation in the land or its profits;

(5) Tithes, which are made hereditaments by 32 Hen. 8, c. 7;

(6) New River shares, see *Drybutter* v. *Bartholomew*, 2 P. Wms. 127; River Avon shares, see *Buckeridge* v. *Ingram*, 2 Ves. 652; and the shares in some other similar undertakings.*

The phrase *hereditaments personal* (or personal hereditaments) includes certain inheritable rights, either having no connection with lands, such as a personal annuity granted for an estate of inheritance, see *Turner* v. *Turner*, Ambl. 776; or having a connection which implies no participation either in the land or its profits; also annuities granted in fee by the crown out of the Barbados duties, see *Earl of Stafford* v. *Buckley*, 2 Ves. sen. 170; and certain other annuities charged upon public revenue, see *Lady Holdernesse* v. *Marquis of Carmarthen*, 1 Bro. C. C. 377; and the term also includes certain offices of dignity or trust which admit of being granted in inheritance, but are attached to the person of some superior dignitary, or are to be exercised only in respect to chattels, as a mastership of hounds.†

There is, perhaps, some variety of usage in respect to the precise place where the line of subdivision is to be drawn between real and mixed hereditaments. But this gives rise to no practical inconvenience; because they are both intailable by

* The right to bring a writ of error upon a judgment in a real action was a mixed hereditament. (Co. Litt. 20 a; and see *Rowlet's case*, Dy. 188 a, there referred to, which incidentally explains his meaning.) The possibility of reverter upon a breach of a condition annexed to an estate of inheritance is a hereditament (3 Rep. 2 b); and must be mixed for the same reason as writs of error. It seems, also, that the right to kill game on land, if (we may presume) limited to a grantee *and his heirs*, is an incorporeal hereditament. (See *Hooper* v. *Clark*, L. R. 2 Q. B. 200; and compare *Webber* v. *Lee*, 9 Q. B. D. 315.) This would seem to savour of the realty quite as much as some other things which have always been held to do so. But the idea of intailing a right of sporting, regarded as a tenement in gross, is somewhat startling to the imagination.

† Villeins in gross were personal hereditaments. (Finch, Law, p. 159.) Also corrodies of office. (*Ibid.* p. 161.) And see the grant of privilege by Edw. I., mentioned in Co. Litt. 1 b, 2 a.

virtue of the statute *De Donis*. The single word *hereditaments*, when used in its largest sense, includes the whole of the particulars enumerated under the three classes above described.

Corporeal and incorporeal hereditaments.

Corporeal hereditaments are fixed as to their definition by the legal maxim, that at common law they lie in livery, and not in grant. The phrase therefore includes only lands regarded as a physical object, and legal estates of inheritance in possession. The only conveyance *in pais*—that is, made between party and party, and not matter of record, as a fine or recovery—by which these could at common law be conveyed to a stranger, was a feoffment, and the essence of a feoffment is the livery of the seisin. All other hereditaments, to which applies the description, *tangi non possunt nec videri*, are included under the term *incorporeal hereditaments*. These are said at common law to lie in grant; because they would pass by the mere delivery of a deed purporting to convey them, and the word *grant* was the most appropriate (though not the only) word of conveyance for the purpose.

The importance of the distinction between corporeal and incorporeal hereditaments has been diminished by 8 & 9 Vict. c. 106, s. 2; which enacts that after 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.

CHAPTER VIII.

OF ESTATES AT COMMON LAW.

The origin of estates.

THE distinction between *absolute dominion*, or absolute ownership, such as the law permits to be had in chattels, and an *estate*, to which the English law restricts the ownership of land, is no doubt referable to the universal existence in England of tenure. But the existence of estates of inheritance was suggested, and made possible, by the indestructibility of their commonest and earliest known subject.

There are three ancient sources of lawful rights of property in England—(1) the common law; (2) the statute law; and (3) customs allowed by the law.* To these must, for many practical purposes, be added—(4) the course of equity, as devised and consolidated by the Court of Chancery before the passing of the Judicature Acts. This last is the origin of equitable estates, which seem now to have a good claim to be also styled *lawful*. But the circumstances of their origin have impressed upon them some important characteristics, which they still in a great measure retain, by which they are distinguished from legal estates, commonly so called, and which make it improper to apply to them the epithet *legal*.

All lawful estates must be traced to one or another of these sources. The first is the source of common law estates; the second is the source of entails; the third is the source of copyhold and customary estates; and the fourth, as already mentioned, is the source of equitable estates.

Fee simple.

Estate for life.

From the common law spring two primitive estates of freehold—(1) a *fee simple*, which is of inheritance, and the largest estate known to the law; and (2) an *estate for life*, that is, for

* "*Consuetudo* is one of the maine triangles of the lawes of England; those lawes being divided into common law, statute law, and custome." (Co. Litt. 110 b.)

the life of the tenant himself. From the fee simple, by its suffering certain modifications which the law permits to be imposed upon it, are derived *determinable fees*, *conditional fees*, and a peculiar kind of fee which may conveniently be styled a *qualified fee* or *qualified fee simple*. The nature of these modifications, and of the estates to which they give rise, will presently be explained. From the estate for life is derived, by its being assigned over to another person, the estate *pur autre vie*. But this last-mentioned estate, though it probably arose from, or was suggested by, the assignment of an estate for life, does not necessarily arise by assignment, but admits of being created *de novo* by express limitation.

Estate *pur autre vie*.

The above-mentioned estates are the only estates known to the common law, and are therefore the only estates held by common law tenure and the only estates of freehold. At the present day a conditional fee of lands or other tenements can exist only in the shape of a fee tail, or estate tail; which estate may be said to owe its existence to the common law, but to derive some of its most important characteristics from the statute *De Donis Conditionalibus*, Stat. Westm. 2, or 13 Edw. 1, cap. 1. It is convenient, for some purposes of discussion, to separate fees tail from the other estates above mentioned. The latter may conveniently be styled *common law estates;* and those which are estates of inheritance, namely, a fee simple, a determinable fee, a conditional fee, and a qualified fee simple, may conveniently be styled *common law fees*.

No other estates at common law.

The statute *De Donis* restricted in some important respects the right of alienation incident to a conditional fee at common law; and a conditional fee thus modified has ever since been styled a *fee tail*, or (of late years more commonly, but less properly) an *estate tail*. The epithet refers to the cutting down of the *quantum* of the estate, by the restriction of the inheritance to a class of special heirs, in the place of the heirs general. The diminution of the *quantum* appears by the fact, that there could be no remainder or reversion, but only a possibility of

Origin of fees tail.

reverter, upon a conditional fee;* while there is a remainder or reversion upon a fee tail. (Litt. sect. 19.)

All tenements are intailable.

The statute uses only the word *tenementum*, which the English versions mistranslate *land*. Not only lands, but all tenements, provided that they are also hereditaments (without which there can of course be no inheritance of them) are intailable by force of the statute.

Such hereditaments as are not tenements cannot be intailed.

Origin of base fees.

From the fee tail sprang the *base fee* commonly so called. Methods of *barring the entail* having been invented, some of them barred it only so far as the rights of the issue in tail were concerned, leaving unaffected the rights of the persons entitled in remainder or reversion. Hence arose an estate which, as will hereafter be shown more fully, was by construction of law an estate of inheritance descendible to the heirs general, and was determined as soon as the right of the remainderman became a present right; that is to say, upon default of issue inheritable under the entail.

Other methods are, or in earlier times have been, known to the law, whereby the duration of an estate in one man and his heirs might, by operation or construction of law, and not by mere conveyance or assurance between the parties, be made to depend upon the continued existence of issue inheritable under an entail previously vested in another person. All such estates are commonly styled base fees.

Vide infra, p. 202, No. 9.

An estate conterminous with a base fee, as above defined, may arise by express limitation, as well as by the conversion of a fee tail. When created by express limitation, it is a determinable fee. But there is this cardinal distinction between a base fee, as above defined, and a determinable fee of the like duration arising under the ordinary rules of limitation; namely, that there exists a remainder or reversion in fee simple upon a

* *Vide infra*, p. 64.

base fee, while no remainder or reversion can subsist upon a determinable fee arising by limitation only.

Modified fees.

All fees, whether common law fees, fees tail, or base fees, except a fee simple, may conveniently be collected together under the term *modified fees*.

How far modified fees now exist.

Such hereditaments as are not tenements cannot be intailed; and words of limitation which, if applied to tenements, would create an entail, will, at the present day, if applied to them, create a conditional fee at common law. (*Earl of Stafford* v. *Buckley*, 2 Ves. sen. 170.) The same remark, *mutatis mutandis*, applies also to copyholds of manors in which there exists no custom to permit entail; the estate being in this case a *customary* fee, not a common law estate. (See the cases cited in the chapter on fees tail, *infra*.) The learning of conditional fees is, therefore, not wholly obsolete, even apart from its bearing upon the existing law of entail.

Determinable fees are as valid in their limitation at the present day as they ever were; nor are they wholly obsolete in practice, for they sometimes occur by express limitation in settlements of realty. Qualified fees simple, as hereinafter defined, if indeed they can be said ever to have existed in practice, are now no longer found; but there seems to be no reason to doubt the possibility of their existence.

Remarks on the division of fees.

The division of fees above proposed is not verbally identical with that given by Lord Coke, Co. Litt. 1 b, 10 Rep. 97 b; but the doctrines laid down are Lord Coke's doctrines, and some difference of language has been adopted only in order to express them more clearly. He sometimes uses the phrase *conditional fee* to include not only conditional fees as herein defined, but also fees limited upon or subject to a condition; and also, in reference to the statute *De Donis*, to include fees tail. He also uses the phrase *qualified or base fee* to include all fees except fees simple and conditional fees; and in this usage he is often followed by other authors. He sometimes (10 Rep. 97 b) uses the phrase *fee simple determinable* to include all fees except fees simple and base fees. But, with the exception of *qualified fee*

simple, which denotes an estate so seldom thought worthy of special mention that it can hardly be said to have acquired a special name, the proposed terms are here used in senses which they frequently bear in the most approved authorities. It has been a common custom for the same author at different times to use the same term in different senses, trusting to the context to show the sense on each particular occasion.

The origin and nature of terms of years.

The early law of England, that is to say, the common law, knew of no estate, or proprietary interest, less than a freehold. The only other title to possession, in the nature of a proprietary right, was a tenancy at will, and there is much reason to believe that the division between estates of freehold and tenancies at will originally corresponded with the division of the population into free and villein. The influence of custom and the growth of humane sentiment gave stability to the ancient tenancies at will, by turning them into the customary estates of the manor; while at the same time the strict legal idea of a tenancy at will, in fact as well as in name, remained applicable to tenancies at will created newly and by mere contract.

A term of years is an anomalous estate, which grew up later than the feudal settlement upon which the estates of freehold were based; and it never acquired any definite place in the feudal system. In the opinion of some early jurists, terms of years, at all events for longer than forty years, were void, as being against the policy of the law. (Co. Litt. 46 a.) This doctrine probably represents rather the tendency of public opinion than the state of the law; for it cannot be shown to have left any traces in the actual practice of any period, and it was undoubtedly obsolete in the time of Richard II. (*Ibid.* Harg. n. 1.)

But terms of years were by the common law liable to destruction at the will of the reversioner having the freehold. If the latter suffered judgment to go against him by default in a collusive action of recovery, a lease previously granted by him for years had no validity as against the recoveror, who claimed and obtained judgment upon a supposed title paramount to the title of the reversioner; and this destruction of his estate could not be hindered by the termor, because, having no freehold, he had

no *locus standi* to intervene in an action of recovery. This hardship was partly remedied by the Statute of Gloucester, 6 Edw. 1, and completely remedied by the 21 Hen. 8, c. 15, which enabled termors to falsify recoveries obtained on feigned titles. (2 Inst. 321, 322; Co. Litt. 46 a.)

They exist as legal estates only by statute.

An estate which could not, by the common law, be defended at law, seems at common law to have been no estate. The foregoing considerations warrant the conclusion, that terms of years originally pushed themseves into the rank of "legal estates," only by virtue of the statute 21 Hen. 8, c. 15. This statute has been repealed by the Statute Law Revision Act, 1863; but the previous abolition of common recoveries by the Fines and Recoveries Act, s. 2, and of real actions generally by 3 & 4 Will. 4, c. 27, s. 36, will prevent the repeal from affecting the legal status of terms of years.

This conclusion, as to the primitive legal status of terms of years, is confirmed by the fact, that the word *seisin* is used by the old writers synonymously with *possession;* showing that they recognized no possession unaccompanied by an estate of freehold. The word seisin is still appropriated solely to describe the possession of freeholders (*Leach* v. *Jay*, 9 Ch. D. 42); while the word possession is commonly used to denote the possession of termors for years, of tenants from year to year, or at will, and of other persons having chattel interests, or in possession under any right or title which is not founded upon an estate of freehold.*

Chattel interests in land other than terms of years.

The cessation of an estate of freehold can only occur by the dropping of a life, or the failure of issue, or the failure of heirs, or the happening of some event, of which the happening is uncertain; and it is often said, that this affords a distinction between estates amounting to a freehold, and estates (meaning thereby, terms of years) less than a freehold. But it is to be observed that, partly by the common law and partly by virtue of divers Acts of Parliament, a chattel interest may under peculiar

* In his translation of Litt. sect. 177, Lord Coke uses the word *seisin* to denote *the act of taking possession of chattels.*

circumstances arise in lands, which, though it is not a term of years, nevertheless endures for a time unascertained at its commencement:—(1) Under a devise to executors merely for the payment of debts; (2) tenancy by statute merchant; (3) tenancy by statute staple; (4) tenancy by *elegit;* (5) by the guardian in chivalry holding over for "single or double value," after the ward's marriage within the age of wardship; as to which penalties, see Co. Litt. 82 b. For some account of these chattel interests having an uncertain duration, see Co. Litt. 42 a; *ibid.* 43 b. The three first mentioned are now obsolete in practice, and the fifth was abolished with the abolition of tenure in chivalry by 12 Car. 2, c. 24. The only one now remaining is tenancy by *elegit.* These interests are not properly estates or proprietary rights, but rather temporary liens, subject to an obligation to apply the profits in a specified manner.

A devise of lands to a man and his executors for the payment of debts gives a chattel interest to the legatee. (1 Prest. Est. 508.) But if the devise had been to the man and his heirs, it would have created a determinable fee. (*Vide infra*, p. 205, Nos. 21—23.)

CHAPTER IX.

ON THE DERIVATION AND SUCCESSION OF ESTATES.

PROPRIETARY ownership, in the absence of any special incapacity, imports as a general characteristic the right of alienation, which right may be exercised either absolutely or partially, in accordance with the maxim, *Cujus est dare, ejus est disponere;* partial alienation being made possible by the fact that estates differ one from another in *quantum.* It follows that, either by means of successive partial alienations, or by means of a single disposition creating several successive estates, several persons may at the same time be entitled, in different degrees of nearness and remoteness, to the possession of the same land, one* only being entitled to the possession at the present time.

Distinctions relating to the succession of estates.

The idea of a partial, as distinguished from an absolute, alienation, opens the distinction between *original* estates and *derivative* estates. The fact that several successive estates may be simultaneously derived out of one original, whereby it comes to pass that a derivative estate may be an estate not in possession, leads to the distinction between *remainders* and *reversions.* The fact that estates may be so limited as to take effect only upon the happening of a contingency, suggests the distinction between *vested* estates and *contingent* estates; which last-mentioned estates can only be *remainders,* because estates in possession and reversion are necessarily vested. And the fact that the ingenuity of conveyancers, operating upon the statutes of wills and the Statute of Uses, has devised other prospective possibilities, unknown to the common law, as interests to arise at a future time, which are not estates, but which will be estates when they arise, makes it necessary to distinguish *executory interests* from *contingent remainders.*

* Tenants in common, coparceners, joint-tenants, and tenants by entireties, being for this purpose counted as one person.

The distinctions above mentioned are the most important of those which need to be considered in treating of the relations *inter se* of estates in respect to the time of their enjoyment.

Original Estates and Derivative Estates.

The terms *derivative* and *original*, as applied to estates, scarcely need definition. When by the act of a grantor or settlor, a less estate is (or several are) parcelled out from a greater, every such less estate is derivative in respect to the greater; which latter, in respect to all the less estates, is original.

The same estate may be both original and derivative.

The word derivative is applied to estates not in reference to any intrinsic quality in the estates themselves, but only to describe their relation to the original estate. An estate which is derivative in respect to a larger estate, may itself be an original estate in respect to a less estate subsequently derived out of it. Every estate (greater than a tenancy at will) is capable of being an original estate.

Merger.

The opposite of the process by which one or more less estates may be derived out of a greater is the *merger of estates*;* by which one or more less estates may become blended with a greater, so as to be indistinguishable from it in the same sense, and to the same extent, as was the case before the less estates were derived out of the greater. Some remarks upon this subject will be found in a subsequent chapter.

Estates cannot be created *de novo*.

From the difficulty of preserving strict consistency when dealing with abstractions, and the confusion introduced by the practice of classing together physical objects and estates under the terms tenements and hereditaments, there have arisen several inaccurate phrases, which can be used only subject to a perpetual tacit correction. A lawful estate cannot, unless per-

* Styled the merger of *estates*,—*i. e.*, the merger of one estate in another estate,—to distinguish it from the merger (more correctly styled *extinguishment*) of incumbrances in the estate over which they subsist: a subject with which the merger of estates is sometimes confused.

haps by the express operation of an Act of Parliament, be created *de novo* in any other sense than that of being derived *de novo* out of an existing estate in which it was previously included. Lands themselves cannot be settled, devised, or intailed, but only estates therein; and the nature of all dealing with the lands is in general circumscribed by the nature of the estate by which such dealing is made possible.

Derivative estates are destroyed by the destruction of the original estate.

Estates which are derived out of any estate less than a fee simple, retain the characteristics of their restricted original. No settlor can emancipate the derivative estates from any restriction, or liability to determination, which affects the original estate out of which they are derived. If the original estate is itself less in *quantum* than a fee, or is a determinable fee, or other determinable estate, or is an estate subject to a condition, then every event by which the original estate is to be, or may be, determined, is by construction of law annexed, as a determinable limitation, to each of the derivative estates; so that each of the latter will be *ipso facto* determined by the happening of any event which determines the original estate, in accordance with the maxim, *Cessante statu primitivo, cessat derivativus.* (1 Prest. Est. 123; and see 8 Rep. 34 a.)

Operation of powers.

The practical application of the maxim, *Cujus est dare, ejus est disponere,* is complicated by the existence of powers; whereby a separation may be effected between the *potestas dandi* and the *potestas disponendi,* to such purpose that there is no necessary relation between the estate (if any) of the person exercising the power, and the estates which may arise by its exercise. In such cases the proposition remains nevertheless true, that the estates which so arise are derived out of an original estate, though that estate may not be vested in the person by whom the power is exercised. And in applying the maxim, *Cessante statu primitivo, cessat derivativus,* to the exercise of powers, we must observe that the *status primitivus* is not necessarily the estate of the donee of the power. In the case of powers contained in wills, or powers operating by virtue of the Statute of Uses, the original estate is the estate of the testator or settlor. In the case of powers created by express statute, the original

estate is the fee simple, upon which, wheresoever it may be subsisting, the statutory power acts, by the direct authority of the law, so far and to such an extent as may be necessary to give effect to the exercise of the statutory power.

Modes of derivation.

Thus the methods by which one estate may be derived out of another may be divided into three heads:—

1. When the original estate is vested in the person by whom the derivation is effected; and who has, by the common law, the right to effect such derivation, as an incident attached to his ownership;
2. When the derivation is effected by the exercise of a power, operating by means either of a devise or of the Statute of Uses; and
3. When the derivation is effected by the exercise of a statutory power, which operates directly upon the legal estate, without need for the intervention of the machinery of uses or devises.

As to estates created *de novo* by statute.

To these must be added certain cases in which it would seem that, by force of an express statute, an estate is truly created *de novo*, being made to arise in one person under circumstances which are inconsistent with the hypothesis that it arises by derivation out of an existing estate, or by the transfer of an existing estate from one owner to another.

(1) By the Fines and Recoveries Act, s. 39, it is enacted, that if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall be united in the same person, without the intervention of any intermediate estate, the base fee shall not merge, but be *ipso facto* enlarged in manner therein mentioned. Here the declaration, that enlargement shall be substituted for merger, is equivalent to a declaration that the estate obtained by enlargement is created *de novo*: since the contrary hypothesis would require a different declaration; namely, that, notwithstanding merger, the remainder or reversion should retain certain characteristics of the base fee.

(2) The Conveyancing Act of 1881, s. 65, amended by the

Conveyancing Act, 1882, s. 11, enacts, that any of the persons interested in manner therein mentioned in a long term of the kind therein specified, may by deed declare that the term shall be enlarged into a fee simple; and that thereupon the term shall be enlarged accordingly. For reasons similar to those alleged in the previous case, the conclusion seems to follow, that the estate obtained by the enlargement is created *de novo*, and is not obtained by a transfer of the pre-existing fee simple.

A question may still remain, whether the pre-existing fee simple is destroyed, or whether it continues to exist in the shape of a reversion upon the fee simple obtained by the enlargement; in which case the latter would exist as a base fee. (*Vide infra*, p. 271.)

The derivation of estates out of an original by the act of parties only, is substantially the same process, whether it is effected by direct assurance, or circuitously, by the exercise of a power created by a settlor. The limits to what can be effected by the direct process are the same as the limits to what can thus be effected by the circuitous process. But the operation of a statutory power is subject only to the limits imposed by the statute. The following observations will illustrate the different aspects of the derivation of estates.

Estates derived out of a fee tail.

1. A fee tail is in the eye of the law a conditional fee, though by the statute *De Donis* certain rights are given to the issue in tail, to defeat alienations made at the common law by their ancestor. That the tenant in tail has a fee, and that a fee tail does not consist of a mere succession of estates for life taken by the successive tenants in tail, is shown by the fact that the alienation of tenant in tail, when it had not the peculiar efficacy of a fine or recovery, would suffice to create a base fee, which on the death of the tenant in tail creating it did not become absolutely void, but only liable to be avoided by the entry of the issue in tail. (*Vide infra*, p. 262.) The same remark holds good of dispositions at the present day made by the tenant in tail, which are insufficient to

bar the entail by virtue of the Fines and Recoveries Act. In this sense a fee may be derived out of a fee tail; but the fee so derived is made voidable by the statute *De Donis.*

Leases made by tenants in tail under 32 Hen. 8, c. 28 (of which the term might not exceed twenty-one years, or three lives), were by that statute made effectual in law as against the issue in tail. Such terms seem to have been derived out of the estate tail. (See 8 Rep. 34 a.) This statute was repealed, so far as tenants in tail are concerned, by 19 & 20 Vict. c. 120, s. 35.

And since no right of entry can accrue to the issue in tail until the death of the preceding tenant in tail, it follows that, to the extent of an estate for the life of the tenant in tail, or a term of years determinable on the dropping of his life, estates may be effectually derived at common law out of an estate tail.

And even when a tenant in tail bars the entail and makes a new settlement, it would seem that the estates comprised in the settlement are derived out of his fee tail; which, by the operation of the Fines and Recoveries Act, seems under such circumstances to be restored to the state of a conditional fee at common law, after the birth of issue inheritable. (*Vide infra*, p. 211.)

Estates subsisting by virtue of any conveyance made by a tenant in tail in possession, in exercise of the powers conferred, as hereinafter mentioned, upon a tenant for life under a settlement by the Settled Land Act, 1882, which powers are by sect. 58, sub-s. (1), (i), of that Act conferred upon a tenant in tail in possession, seem to take effect in defeasance of the estate tail and not by derivation out of it. But the question was probably not foreseen when that Act was passed, and it cannot be confidently answered.

Estates derived out of an estate for life.

2. Out of an original estate for the life of the grantor, there can be derived only estates determinable upon the dropping of his life. These may be either estates for joint lives, one of the lives being the life of the grantor;

or they may be terms of years determinable either upon the dropping of one of such joint lives, or upon the dropping of the grantor's life.

The tenant of an estate for life which arises under a settlement, when his estate is vested in possession, being the person who is for the time being, under the settlement, beneficially entitled to the possession of the settled land for his life, is enabled, by the Settled Land Act, 1882, to exercise the powers of sale, exchange, partition, leasing, and other powers conferred by that Act. (See sect. 2, sub-s. 5 of the Act.) Estates created by the exercise of these powers may be equal in *quantum* to the whole estate comprised in the settlement, which may, of course, be a fee simple. Such estates cannot be derived out of the estate for life of the donee of the powers, but arise by force of the statute. They seem to be derived out of the original estate of the settlor, and to be, under the provisions of the Act, determinable with its determination.

3. Out of an original estate *pur autre vie*, whether for life or lives, there can, in like manner, be derived only estates determinable upon the dropping of all, or some, of the original lives. Such estates may be estates for life, estates *pur autre vie*, or terms of years. Estates derived out of an estate *pur autre vie*.

A tenant for the life of another, "not holding merely under a lease at a rent,"—which language perhaps implies that the contemplated tenancy must arise under a settlement,—has, when his estate is in possession, the powers of a tenant for life under the Settled Land Act, 1882. (Sect. 58, sub-s. 1, v.)

4. Out of a term of years there can be derived no estate, but a term of years, either expressed to be of less duration than the original term, or determinable (whether expressly or by operation of law) with its determination. Estates derived out of a term of years.

A tenant for years "determinable on life,"—which seems to mean, "determinable on the dropping of a life or lives,"—not "holding merely under a lease at a rent,"

has, when his estate is in possession, the powers of a tenant for life under the Settled Land Act, 1882. (Sect. 58, sub-s. 1, iv.)

On the Terms Vested, Contingent, and Executory.

Vested estates defined.

Of the divisions into *vested and contingent* and into *vested and executory*, neither is exhaustive; but the term *vested estate* is sometimes opposed to the term *contingent estate*, and is sometimes opposed to the term *executory interest*.

An estate may be either vested *in possession*, or vested only *in interest*, the actual possession being in another. The phrase, vested in possession, needs no definition. An estate is said, though not vested in possession, to be vested in interest in a given person, when that person would be entitled, by virtue of it, to the actual possession of the lands, if the estate should become the estate in possession by the determination of all the precedent estates. In the words of Fearne:—"It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that, every remainder for life or in tail is and must be liable; as the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." (Fearne, Cont. Rem. 216.)

True criterion between vested and contingent estates.

Restriction upon the criterion.

But this language must be accepted subject to the observation, that a limitation in remainder to the heirs of a living person gives rise to a contingent remainder (*vide infra*, p. 103); although the heir apparent or presumptive for the time being is always ready, during the ancestor's lifetime, to step into the possession if it should become vacant. The above-cited language does not apply to the case of a person claiming as heir during his ancestor's lifetime, because his claim is liable to be defeated by his ceasing to be heir, either, if he is heir apparent, by his own

death in the ancestor's lifetime, or, if he is only heir presumptive, also by the birth of a prior heir.

Existence of a prior power does not prevent vesting.

It is now clearly settled, after considerable doubt and hesitation, that the existence of a power of appointment will not prevent estates limited to take effect in default of the exercise of the power from vesting, if they are such as, apart from the existence of the power, would be vested estates. (Fearne, Cont. Rem. 226 *et seq.*) Such estates are said to be vested, but liable to be devested by an exercise of the power.

Contingent estates.

Contingent estates are capable of being limited under the rules of the common law; and their distinguishing quality of contingency is conferred upon them by the terms of their limitation; either (1) by a provision that the specified person shall not take unless a contingency shall happen, or (2) that he shall not take until the happening of a future event, or (3) by reason that the limitation is in favour of a person not ascertained, or not yet in being.

Of these three sub-divisions, the first comprises the first and second of Fearne's four classes; and the second and third correspond with his third and fourth classes respectively.

Executory interests.

Executory interests do not admit of being limited under the rules of the common law. They owe their whole existence partly to the statutes permitting devises of lands, and partly to the Statute of Uses. The limitations under which they arise are called *executory limitations*, which in a testament are *executory devises*, and in a deed are *springing* or *shifting uses*. Terms which properly refer to the mode of their limitation are in practice often confused, or used interchangeably with, terms which properly refer to the nature of the interest taken under such limitations. This usage is especially frequent with respect to executory devises; that is to say, an executory interest arising by executory devise, is often briefly styled an executory devise.

Since executory interests may be, though they are not necessarily, limited to arise upon a contingency, they are liable to be confused with contingent remainders. The distinction between

Distinction between contingent estates and executory interests.

them is given by the following propositions:—Every limitation which creates, in favour of a specified person, a possibility of the vesting of an estate in him at a future time, which is valid by the rules of the common law, gives rise to a contingent remainder. And every such limitation which is valid in a will or in a conveyance to uses, but would not be valid as a limitation under the rules of the common law, gives rise to an executory interest.

How far assignable or transmissible.

In the view of the common law, both contingent remainders and executory interests were only *possibilities*,* and therefore were not assignable *inter vivos* (Case in C. B. cited in 4 Rep. at p. 66); though, as being not *bare* possibilities, but possibilities *coupled with an interest*, they might be devised under the Statutes of Wills. (*Roe* v. *Jones*, 1 H. Bl. 30; S. C. in B. R. *sub nom.* *Jones* v. *Roe*, 3 T. R. 88.) They might also, at common law, be released (*Lampet's case*, 10 Rep. 46), and be bound by estoppel. (*Weale* v. *Lower*, Pollexf. 54; *Doe* v. *Martyn*, 8 B. & C. 497; *Doe* v. *Oliver*, 10 B. & C. 181.) Contracts, and assurances relating to them, if made for valuable consideration, might generally be enforced in equity (*Wright* v. *Wright*, 1 Ves. sen. 409; *Crofts* v. *Middleton*, 8 De G. M. & G. 192); which remark applies even to such absolutely bare possibilities as the expectations of heirs during the lives of their ancestors, and of devisees and legatees during the lives of their testators or possible

* The word *possibility* has been obscured by its confused usage. But three kinds can be distinguished:—

(1) *Possibilities coupled with an interest;* as contingent remainders and executory interests; which, so soon as the person in whom they will vest, if they do vest, is ascertained, are both descendible and deviseable.

(2) *Bare possibilities;* as the possibility of reverter on the breach of a condition, and the possibility of reverter upon a common law fee other than a fee simple; these at common law are descendible but not deviseable.

(3) *Absolutely bare possibilities*, or mere expectations of possible benefits, not founded upon the dispositions or provisions of any operative assurance. These at common law are neither descendible nor deviseable; though the succession of children by representation in heirship often did, so far as the expectations of heirs are concerned, amount practically to the same thing. But, in strictness, they did not *succeed to the expectation*, but to the heirship upon which it was founded.

Such possibilities of devisees, if children of the testator, are practically made sometimes descendible by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 33.

testators. (*Beckley* v. *Newland*, 2 P. Wms. 182.) Now, by 8 & 9 Vict. c. 106, s. 6, both contingent remainders and executory interests may be "disposed of" by deed.

Remainders and Reversions.

Nature of the distinction between them.

Remainder and *reversion* are both relative terms, each depending upon the relation of an estate which is posterior in point of time to an estate which is prior in point of time. The prior estate is in both cases styled the *particular* estate. The distinction between a remainder and a reversion lies in the difference in the relation borne by them respectively to the particular estate; and this relation depends upon the circumstances under which the particular estate became separated from the reversion or remainder.

A remainder is constituted by the act, expressly directed to that end, of a grantor or settlor, who simultaneously derives two (or more) estates out of his own estate, and limits them to different persons by way of succession, in such a way that the estates may successively become the estate in possession, each of them (except the first in order) giving a *present title* to the *future possession*. Of two estates so created, that which is posterior subsists as a remainder in expectancy upon that which is prior in the order of time and of limitation.

A reversion, without any express act of the grantor or settlor, is left in him by the operation or construction of law, when he merely parts with less than his whole estate, retaining in himself a residue which awaits the determination of that with which he has parted, before it can become the estate in possession.

Every reversion is (or rather, once was) an original estate in respect to the particular estate, which latter, with respect to the reversion, is derivative. (1 Prest. Est. 123.) The relation between a remainder and the particular estate consists in their having both been simultaneously derived out of the same original; and for many purposes the particular estate and all remainders upon it are in law regarded as making together but one estate. (Co. Litt. 49 b; *ibid.* 143 a.)

Thus the priority in time of the particular estate over the

remainder is due to the intent, expressed in the limitation, of the grantor or settlor; but the priority in time of the particular estate over the reversion is due to the construction or operation of law.

The following definitions, by which remainders are distinguished from reversions, will be found instructive:—

Remainder defined.

"A remainder is an estate limited to commence after the determination of a particular estate, previously limited by *the same deed* or instrument out of the same subject of property." (1 Prest. Est. 90.)

Here *deed* must be taken to include any *act in the law*. By the common law, before the Statute of Frauds, a particular estate followed by a remainder might have been created by feoffment without any writing; and a deed was first made necessary by the 8 & 9 Vict. c. 106. It would also seem that the expression *same deed* must be taken to include several deeds delivered at the same time, upon the principle of the maxim, *Quæ incontinenti fiunt, inesse videntur*. But Preston questions this application of the principle. (1 Prest. Est. 90, note *q*.)

"'Remainder' in legall Latine is *remanere*, coming of the Latine worde *remaneo*: for that it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time." (Co. Litt. 143 a.)

"'*The remainder*' is a residue of an estate in land depending upon a particular estate, and created together with the same." (Co. Litt. 49 a.)

Reversion defined.

"A *reversion* is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate." (Co. Litt. 22 b.) The second clause of this definition was not intended to give an alternative definition, but only to expand the meaning of the first clause.

The ambiguous nature of terms of years, gives an ambiguous meaning to reversions and remainders expectant upon terms of

Reversions and remainders upon terms of years.

years. In so far as such a reversion, or remainder, does not give an immediate title to the actual or physical possession of the lands, during the continuance of the term, it may be regarded as being in fact a reversion or remainder; and in this sense such estates are commonly styled reversions and remainders. But for some purposes the question is not, who has an immediate title to the physical possession, but, who has an immediate title to the feudal seisin; and for these purposes, such a so-called reversion or remainder is not truly a reversion or remainder, but is itself the estate which confers the freehold during the continuance of the term. (*Vide infra*, p. 77.)

Remainder upon a base fee.

The remainder which may subsist upon a base fee has in all essential characteristics the quality of a remainder, and not of a reversion. In a certain sense, it is an exception to the rule, that every remainder must be created by the same act or deed, and at the same time, as the particular estate; for it was not created along with the base fee, but with the fee tail, out of which the base fee subsequently arose. And in a like sense it constitutes an exception to the rule, that remainders are created by act of parties, and reversions by operation of law; for though the remainder upon the fee tail was created by act of parties, yet, when the fee tail is turned to a base fee, the remainder upon it may more properly be said to be created, and to subsist, by operation of law.

The same estate may be both remainder and reversion.

Out of an estate in remainder, which is already *in esse*, other estates may be derived. With regard to such estates, the remainder itself will be a reversion; but with regard to the estate out of which it was itself derived, it will be a remainder. Thus the same estate may, in different relations, be both a remainder and a reversion. (1 Prest. Est. 123.)

Alternative remainders in fee.

Several fees may, at common law, be limited in the alternative by way of remainder upon the same particular estate, upon such contingencies that not more than one of them can by possibility happen. (*Loddington* v. *Kime*, 1 Salk. 224, 1 Ld. Raym. 203; and see Fearne, Cont. Rem. 373; *Doe* v. *Burnsall*, 6 T. R. 30; *Re White and Hindle's Contract*, 7 Ch. D. 201.) Of such fees,

each is a remainder in regard to the particular estate, but none is a remainder in regard to any other of them.

Two invariable rules relating to remainders.

It is essentially characteristic of a remainder (1) to await the regular determination of the precedent estate, and (2) to be limited to take effect in possession immediately upon that determination. A remainder may neither be limited to take effect upon the determination of the precedent estate by forfeiture for breach of a condition, nor to take effect upon the expiration of an interval of time after the regular determination of the precedent estate.

These rules not applicable to executory interests.

In both these respects remainders differ from executory interests. An executory limitation may take effect upon the defeasance of an estate of freehold by entry for the breach of a condition, and it may be limited to take effect at the expiration of an interval to elapse after the determination of a precedent estate.

First Rule. Every remainder must await the regular determination of the precedent estate.

1. The first rule, that *every remainder must await the regular determination of the precedent estate*, follows from the rule of the common law, that no one may take advantage of a condition, except the person making it, or his privies in right and representation; that is—(1) the heirs, *quoad* estates descendible to them, (2) the executors or administrators, *quoad* estates transmissible to them, and (3) the successors of corporations sole. (Prest. Shep. T. 149.) The statutory innovations upon the common law (32 Hen. 8, c. 34, 22 & 23 Vict. c. 35, s. 3, and the Conveyancing Act of 1881, ss. 10, 12) which have in certain cases enabled grantees and assignees of reversions to take advantage of conditions annexed to particular estates, contain nothing to alter the common law, so far as persons entitled in remainder upon a particular estate are concerned.

A distinction noted.

But if a particular estate is at its limitation expressed to be defeasible upon breach of a condition, there is an important distinction between—(1) cases in which a remainder is limited to commence upon the *defeasance* of the particular estate, and (2) cases in which a remainder is limited, without any reference to the condition, to commence upon the *determination* of the par-

ticular estate. In the former case, an entry made for breach of the condition will destroy the remainder; but in the latter case, the limitation of the remainder makes the condition itself void. (Fearne, Cont. Rem. 270; 1 Prest. Est. 91.)

A determinable estate, which is liable to determine upon the happening of a future event, by virtue of a determinable (or collateral) limitation, is normally determined by the happening of that event; and a remainder may be as well limited over upon such a determinable estate, as upon the like estate when not determinable. Thus, a remainder may be limited after an estate to a woman *durante viduitate*, as well as after an estate to her for life simply. This doctrine is often, but not very felicitously, expressed by saying, that a stranger can take advantage of a conditional (that is, a determinable or collateral) limitation, but not of a condition. (Co. Litt. 214 b.)

Second Rule. And must take effect immediately upon such determination.

2. The second rule, that *no remainder may be limited to take effect upon the expiration of an interval of time after the determination of the precedent estate*, follows from the rule of the common law, that the immediate freehold may not, by any act of parties, be placed in abeyance. (*Vide infra*, p. 78.)

Possibility of Reverter.

Reverter and *reversion* are synonymous terms, denoting an estate vested in interest though not in possession; but the word reverter is sometimes loosely used to denote what is properly styled *possibility of reverter*. Possibility of reverter denotes no estate, but, as the name implies, only a possibility to have an estate at a future time. Of such possibilities there are several kinds; of which two are usually denoted by the term now under consideration:—(1) the possibility that a common law fee may return to the grantor by breach of a condition subject to which it was granted, and (2) the possibility that a common law fee, other than a fee simple, may revert to the grantor by the natural determination of the fee.

Since every remainder and every reversion is a part only of the estate of the grantor or settlor, it follows that, by the com-

mon law, no remainder can be limited in expectancy upon the determination of a fee, and that no reversion can remain in a grantor or settlor who parts with a fee. There cannot exist two common law fees in the same land. (Co. Litt. 18 a; *Willion* v. *Berkeley*, Plowd. 223, at p. 248; and authorities cited in the margins.) In regard to a fee simple and a determinable fee, this proposition has never been disputed. In regard to a conditional fee, Preston treats it as being not indisputably certain, but as depending only upon a preponderance of authority. (2 Prest. Est. 318; *ibid.* 320, note.) In more than one passage of his works something like a wavering of his own opinion may perhaps be detected. (See 2 Prest. Est. 299; *ibid.* 353; 1 Prest. Abst. 379.)

Two common law fees cannot exist in the same land.

It is conceived that no reason can be given, upon principle, why conditional fees should be distinguished in this respect from other fees. The later authorities seem to concur with Lord Coke in the opinion, that no expectancy other than a possibility of reverter can exist upon a conditional fee. There is a somewhat obscure passage of Bracton, in which he seems to intimate an opinion that several successive conditional fees could by the common law be limited in remainder one after another.* It is conceived that the clear and reiterated opinion of Lord Coke, which has the advantage of being manifestly in accordance with general principle, is more than sufficient to outweigh the opinion of Bracton; especially as the latter does not seem to be aware that his opinion, if true, would be a remarkable anomaly. (Co. Litt. 22 a; *ibid.* 327 a; 2 Inst. 335; *ibid.* 336; *Marq. of Winchester's Case*, 3 Rep. 1, at p. 3 b. See also his comment on Litt. sect. 11.)

This rule applies to conditional fees.

It is an indisputable fact, that by the common law there did exist a *formedon en reverter* for the benefit of the donor, as is expressly stated in the statute *De Donis*;† while there did not

* The passage is that cited by Preston (2 Prest. Est. 324) and others from Bracton, lib. 2, c. 6, fo. 18 b of edit. 1569; Vol. I. p. 146, of the Rolls Ed. 1878:—Item poterit pluribus fieri donatio *per modum* simul et successivè, &c. Per modum = sub modo = conditionally; and the example given is of such limitations as would create conditional fees. The same passage is almost literally transcribed in Fleta, lib. 3, c. 9, § 9; Selden's ed. p. 186; where *filii* is absurdly printed instead of *simul*.

† "The writ whereby *the giver* shall recover, *when issue faileth*, is common

exist a *formedon en remainder* in respect of conditional fees.* This seems to show that there could be no such remainder upon a conditional fee; and if there could be no remainder, it follows that there could be no reversion.

The fact that a doubt at one time prevailed (Co. Litt. 22 b) whether there could exist a reversion upon a fee tail after the statute *De Donis*, is a strong argument to show that there could not previously have existed a reversion upon a conditional fee at common law.

The point was decided by Lord Hardwicke in *Earl of Stafford* v. *Buckley*, 2 Ves. sen. 170. Preston shows some disposition to carp at this decision. (1 Prest. Abst. 379; see also 1 Prest. Est. 417, note.) Probably he meant only to correct Lord Hardwicke's apparent assumption, that the point was beyond all possibility of doubt.

The remarks cited by Preston from Watkins on Copyholds, are really addressed to the solution of another question:—the perhaps insoluble question, how there can possibly exist a custom to permit entails of copyholds, seeing that all customs must, in the eye of the law, have been in existence before the first year of Ric. 1, while the statute *De Donis* was not passed until the thirteenth year of Edw. 1. Watkins seems to conclude that, since this is in fact impossible, it cannot be true that entails of copyholds exist by virtue of a custom to intail as affected by the statute; but that they exist solely by virtue of a custom to grant in customary fee simple as affected by the statute; and that, by consequence, entails of copyholds may exist in all manors in which there is a custom to grant in fee simple. But it must be taken as settled by authority, that in such manors, where there exists no custom of entail, a gift in tail will create a conditional fee.

[On this subject, see the chapter on fees tail, *infra*.]

enough in the Chancery." (1 Stat. Rev. p. 43.) And see 2 Inst. 336. In the same page, Lord Coke denies that a *formedon en descender* lay at common law, though in Co. Litt. 19 a, *ibid.* 20 a, he affirms the contrary. In note (5) on Co. Litt. 19 a, where the reference to 2 Inst. is incorrectly given, Hargrave endeavours to reconcile the discrepancy. (See also, Co. Litt. 60 b.)

* Several authorities mention that, in the opinion of some people, the remainderman upon an *estate for life* might, after the death of the tenant for life, have had a *formedon en remainder* at common law. (Booth, Real Actions, p. 151; Litt. sect. 481, and Lord Coke thereon.) Booth doubts this, while Littleton and Lord Coke both deny it. The question is, at all events, foreign to the present purpose.

CHAPTER X.

MERGER.

Definition

MERGER is the opposite of the process by which less estates are derived out of a greater, whereby one or more less estates may so become blended with a greater, as to be indistinguishable from it in the same sense, and to the same extent, as was the case before the less estates were derived out of the greater. Merger generally takes place when two estates, either related *inter se* as derivative and original, or else being both derived out of the same original, and both being held in the same right, meet together in the same person; the posterior estate—(1) being greater, or, at least, not less, in *quantum* than the prior estate; and (2) following immediately after it in the order of succession, without the intervention of any intermediate estate.

And if any number of successive estates, of which each successive pair fulfils the conditions above laid down, should meet together in the same person, all the prior estates will in general be merged in the estate which is last in the order of succession.

It is immaterial whether an intermediate estate was created at the same time as, or subsequently to, both or either of two estates which it separates: in either case, such intermediate estate will prevent merger. (3 Prest. Conv. 127.)

Undivided shares.

For all purposes of merger, an undivided share of land is a separate tenement. When estates in undivided shares meet in the same person, merger does not ensue unless the contiguous estates both refer to the *same* undivided share: a question which commonly admits of being answered, upon properly deducing the titles to the several shares. If there is nothing whatever to show whether they refer to the same or to different shares, the presumption seems to be, that they refer to the same share. (3 Prest. Conv. 98, 99.)

For some remarks upon the destruction of contingent remainders through merger, see p. 108, *infra*.

Merger has a very close resemblance in its operation to surrender; and it is frequently confused with extinguishment. It would also appear to have been sometimes thought to resemble discontinuance and remitter. (3 Prest. Conv. 9—13.) A few remarks, by way of distinction, may therefore be here introduced. Distinctions.

It is the general rule, that two estates will merge when they meet in the same person, without the intervention of any intermediate estate, and are such that the prior estate might have been surrendered to the tenant of the posterior estate. (3 Prest. Conv. 152.) In this sense it may be said, that the scope of merger is identical with the scope of surrender. But this resemblance holds good only for the purpose of ascertaining the *relative quantum* of the relevant estates. Merger is not due to the same cause as surrender; for it arises by operation of law, and as the mere result of the situation of the estates *inter se* at the time of the merger, without regard to the intention of the parties by or through whom they were placed in that situation. But surrender is due to the intention, and is the effect of the act of surrender, and not merely of the situation in which the surrender places the two estates. (Prest. Shep. T. 301.) Under special circumstances, the operation of merger and of surrender may be very different. Thus, if there be an estate for life in one person, with the reversion in two other persons as joint tenants, then, if the tenant for life should *surrender* his estate to one of the joint tenants, it will be destroyed, since one joint tenant can accept a surrender as fully as if he were solely seised; whereby the estate of each joint tenant is accelerated. But if the tenant for life should *grant* his estate to one of the joint tenants, one moiety only would be merged in his moiety of the reversion, and the other moiety would remain on foot, and vested in the same joint tenant, as an estate *pur autre vie*, with reversion to the other joint tenant. (3 Prest. Conv. 24.) The merger would effect a severance of the joint tenancy in the reversion. (Co. Litt. 183 a.) Surrender. May differ from merger in operation.

Extinguishment is properly used to denote the annihilation

Extinguishment.

of a collateral thing in the subject out of which it is derived; as of a rent-charge, chief rent, common, profit *à prendre*, easement or seignory, in the land to which they respectively relate; or of an incumbrance, or an equitable estate, in the corresponding legal estate.

It is necessary, in order that an extinguishment may take place, (1) that the right to the collateral thing and an estate in the land itself, shall come to the same hands; and (2) that the estate in the land be not less, in point of *quantum* and duration, than the estate in, or right to, the collateral thing. If the estate in the land should be less than the other estate or right, or if it should be defeasible, the rent or other collateral thing

Suspension.

will only be *suspended* during the continuance of the estate in the land, and it will be revived upon the latter's determination or defeasance. (Co. Litt. 313 a, b.)

Discontinuance.

A discontinuance, when that term is applied to estates in land, was the result of certain assurances which, by the common law, had a tortious operation, whereby, under certain circumstances, one person might wrongfully destroy the estate of another; or rather, interrupt and break off the right of possession, or right of entry, subsisting under that estate, without any assent or *laches* on the other's part. (See Littleton, Book 3, Chap. 11.) For example, a feoffment purporting to be made in fee simple by a tenant in tail actually seised in possession, destroyed (or rather, interrupted) both the estate tail itself, and all remainders, and the reversion, if any, expectant thereupon; and obliged the persons lawfully claiming by virtue of those estates respectively, if they desired to prosecute their rights, to have recourse to a real action. The word discontinuance properly denotes this *turning of an estate to a right of action;* though it is sometimes used to include also the turning of an estate to a right of entry (Litt. sect. 470, and Co. Litt. 325 a), a change which could be effected much more easily, and which obviously did much less injury to the owner of the estate. The word *devest* is more properly used to denote the turning of an estate to a right of entry. While no feoffment would discontinue lawful estates, except the feoffment of a tenant in tail actually seised, the feoffment of any person lawfully in possession, though

only as tenant at will, would suffice (at common law) to devest lawful estates. This capacity of a tenant in tail in possession to effect a discontinuance, arose from the fact that, at common law, he had a conditional fee; and that the rights of the issue in tail, given to them by the statute *De Donis*, and also the rights of remaindermen and reversioners, could be prosecuted only by a real action brought upon a writ of *formedon*.* The destruction of an estate formerly existing under a lawful title, and the simultaneous coming into existence of a fee simple existing only under a wrongful title, may be thought to have some sort of resemblance to the operation of merger. The abolition of fines and recoveries, and of the tortious operation of feoffments, has deprived the subject of its application to practice; though there remains a possibility that the learning of the subject may be required in the investigation of old titles.

Remitter.

The law of remitter is a very curious and entertaining branch of learning; but it probably has now no practical importance. Remitter might be defined as the opposite of discontinuance, being an act or operation of law, whereby a right of entry, or a right of action, might be turned to an actual estate without the necessity for making an entry or bringing an action, in fact.

* The writ was styled formedon *en descender* when brought by the issue, *en remainder* when brought by the remainderman, and *en reverter* when brought by the reversioner. On actions of formedon, see Booth, Real Actions, 139—166. (1) As to formedon *en descender*, since at common law an estate tail was a conditional fee, and the alienation of the tenant of a conditional fee, even before issue had, bound the issue if born subsequently, though it did not bar the reverter, it seems to follow that there could not possibly, for this purpose, have existed any such writ at common law, since the right which it was meant to enforce did not exist. Lord Coke perhaps thought that the writ lay at common law under special circumstances. See Harg. n. 5 on Co. Litt. 19 a. (2) As to formedon *en remainder*, it seems that this certainly did not lie at common law in respect to conditional fees; and probably not in respect to anything else. *Vide supra*, p. 65, note. Booth's language is not quite consistent, for he begins by alleging the invention of the writ of entry *in consimili casu*, by virtue of Stat. Westm. 2, c. 24, as a reason for disbelieving altogether in the existence of formedon *en remainder*, in respect to remainders upon estates for life, and then suggests that this evidence perhaps only shows that the writ of formedon could not be had in the lifetime of the tenant for life. (3) There was a possibility of reverter upon a conditional fee, and formedon *en reverter* was the proper remedy therefor at common law; as is expresely stated by the statute *De Donis*. *Vide supra*, p. 64, note.

This occurred whenever the actual seisin, existing under a tortious title, accrued to a person having also in himself a rightful title in the shape of a right of entry or a right of action, such person not being implicated in the tort under which the tortious seisin had arisen, or otherwise estopped from asserting and maintaining his rightful title, and not having assented to the vesting of the tortious seisin in himself. Remitter gave to the person who was said to be remitted his rightful estate, or rather, the estate under his rightful title, to the same extent as he might have gained it by making an entry or bringing a real action, as the case might require. For example, if a tenant in tail in possession had by a (tortious) feoffment discontinued the estate tail, and had afterwards re-acquired the seisin by a disseisin of the feoffee, then, upon his death, if his heir in tail was also his heir general, the heir would have acquired by descent the seisin existing under the disseisin, and would also have inherited the *mere right* subsisting under the discontinued estate tail. The disseised feoffee might have defeated the seisin acquired under the disseisin, by bringing a writ of entry *sur disseisin* in the *per* against the heir; but since the heir had been no party to the discontinuance or to the disseisin, and the tortious seisin had descended upon him by inheritance without his assent, he was *remitted* by operation of law to his earlier title under the entail, which was indefeasible so far as any proceedings under the disseisin were concerned. (Litt. sect. 659.) Therefore, under the ancient system of procedure, questions of remitter were often of great practical importance. At the present day, when no assurance can operate by tort, and real actions no longer exist, the law of remitter seems to have no practical interest, except what may be derived from its possible bearing upon old titles. It is true that such a thing as an actual disseisin is still possible (*Leach* v. *Jay*, 9 Ch. D. 42, at p. 44); and the effect of an actual disseisin is to turn the estate of the disseissee to a right of entry; which might seem to afford an opening for the learning of remitter. But there seems to be nothing in the modern rules of pleading to prevent the defendant in an action for the recovery of land from relying upon any title whatever which he may possess; and this seems to deprive the law of remitter of all importance in relation to

The law of remitter is now obsolete.

modern practice. Remitter may be said to resemble merger, in so far as it involves the disappearance of one estate upon the revival of another estate; but the two estates, in a case of remitter, arise under distinct titles, whereas it is essential to merger that the two estates shall both arise under the same original title.

Estates en Autre droit.

When estate *en autre droit* is not merged.

If two estates, which would under the foregoing rules be capable of merger, come into the hands of the same person by operation of law and not by act of parties, there will be no merger unless both the estates are held in the same right. For example, a term of years coming to a man as executor of the deceased termor, and therefore held by him *en autre droit*, will not merge in his own freehold. (Co. Litt. 338 b.) A term held by the heir as executor of his ancestor, will not merge in the inheritance descending upon him. (*Vincent Lee's Case*, 3 Leon. 110.)

When estate *en autre droit* is merged.

When the accession of the two estates is not by operation of law but by act of parties, it is the better opinion that at law, merger would ensue. (3 Prest. Conv. 285; Wms. Exors. 7th ed. 641, 642.) Mr. Justice Fry, in *Chambers* v. *Kingham*, 10 Ch. D. 743, at p. 746, seems *obiter* to have expressed a contrary opinion; but he does not seem to have been aware that the distinction had ever been taken. There is a passage in *Gage* v. *Acton*, 1 Salk. 325, at p. 326, in which Lord Holt seems *obiter* to have expressed a similar opinion, also without showing any consciousness of the existence of any distinction.

Distinction taken by Lord Coke.

According to Lord Coke, though a man may have a freehold in his own right and a term of years *en autre droit*, he cannot have a term of years in his own right and a freehold *en autre droit*. (Co. Litt. 338 b.) This distinction does not seem to be well grounded. (3 Prest. Conv. 278; *Jones* v. *Davies*, 7 H. & N. 507.) Yet it is clear that Lord Nottingham thought there would be a merger at law; see 3 Swanst. at pp. 618, 619. It is not recognized in equity. (*Thorn* v. *Newman*, 3 Swanst. 603; *Nurse* v. *Yerworth*, 3 Swanst. 608, at p. 619.)

Of Estates Tail and Base Fees.

No merger in a fee simple,

There is no merger of the estate tail in a remainder, or the reversion, in fee simple, when they meet in the same person without the intervention of any intermediate estate. (3 Prest. Conv. 341; *Wiscot's Case*, 2 Rep. 60, at p. 61 a.)

or in a subsequent fee tail.

One estate tail will not merge in another. An estate in tail male may co-exist with another estate in tail female in remainder, both being vested, without the intervention of any intermediate estate, in the same person. (Litt. sect. 719, and Lord Coke's comment.) The rule is not confined to the particular kinds of estates tail just mentioned. Several estates tail, limited in immediate succession, may co-exist in the same person by way of remainder, so long as the limitation is not made nugatory by the absolute inclusion of any of the posterior estates in any of the prior estates; as, for example, by the limitation of an estate in tail male or in special tail, in remainder upon an estate in tail general. (3 Prest. Conv. 246.) If the posterior limitation is absolutely included in the prior limitation, the posterior limitation is void for absurdity. (Co. Litt. 28 b.)

Base fees, and the estate of tenant in tail after possibility.

The rule which protects estates tail from merger, holds good only so long as the estate is required to be in being for the purpose of securing to the issue in tail the benefits designed for them by the statute *De Donis;* and when that purpose cannot be served, there is no protection against merger. Accordingly, neither a base fee, nor the estate of tenant in tail after possibility of issue extinct, is at common law protected against merger. (Co. Litt. 28 a; 3 Prest. Conv. 345.)

Enlargement of base fees in lieu of merger.

The Fines and Recoveries Act, s. 39, provides, that whenever after 28th August, 1833, a base fee in any lands, and the remainder or reversion in fee in the same lands, shall be united in the same person, and there shall be no intermediate estate, the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail (which here, by virtue of s. 1, signifies the person who would have been tenant in tail if the estate tail had not been barred), with the consent of the protector, if any, might have created by any disposition under the Act, if such remainder or reversion had been vested in any other person.

The Modern Law of Merger, and Merger in Equity.

The Judicature Act, 1873, s. 25, sub-s. (4), enacts that after the commencement of the Act, there shall not be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. By virtue of 37 & 38 Vict. c. 83, s. 2, this enactment takes effect as from 1st November, 1875. 36 & 37 Vict. c. 66. Merger now follows the rules of equity.

It has been said, "that mergers are odious in equity, and never allowed, unless for special reasons." (1 P. Wms. at p. 41.) But this must not be understood to mean, that equity never suffered a merger at law to effect any practical alteration in the rights of parties; for such a proposition would be manifestly erroneous. Equity never hindered the destruction of contingent remainders by merger through collusion between the tenant for life and the vested remainderman; and even in cases where trustees to preserve contingent remainders were parties to the destruction, relief in equity could not always be given by preventing the merger, though the trustees would be ordered to make good the damage. (*Vide infra*, p. 115.) Merger not favoured in equity.

The following points are very material, in considering the practical result of the assimilation of merger at law to merger in equity.

1. Since the common law courts could take no notice of trusts, there might be a merger at law between two estates held in the same right, although one of them was held upon a trust. (3 Prest. Conv. 285.) Trusts.

2. The eldest son and heir apparent of a man who was entitled to a long term of years, by collusion with the reversioner, and by misrepresentation and fraud practised on his father, induced the father (apparently) to assent to certain conveyances whereby the term of years became merged at law in the reversion, so that ultimately the heir at law might obtain the land discharged from the term, and the father be prevented from availing himself Fraud.

of the term in order to provide portions for younger children. It was held that the fraud was a ground for relief in equity. (*Danby* v. *Danby*, Rep. temp. Finch, 220.)

Lord Coke's distinction as to *en autre droit*.

3. If the above-mentioned distinction taken by Lord Coke as to estates *en autre droit*, ever was the rule at law, it is the rule no longer. (*Thorn* v. *Newman*, 3 Swanst. 603; and see *Nurse* v. *Yerworth*, 3 Swanst. 608, at p. 619.)

The distinction as to *en autre droit*, as regards act of parties and act of law.

4. In *Chambers* v. *Kingham*, 10 Ch. D. 743, at p. 746, Mr. Justice Fry seems *obiter* to have expressed the opinion, that even at law two estates cannot merge when one is held *en autre droit*, although they both come to the hands of the same person by act of parties and not by operation of law. In the same case he seems to have expressly decided, that at all events there is under such circumstances no merger in equity. This decision is not entirely satisfactory; because there seems to have been little argument, and it appears that the court was imperfectly informed as to the authorities. But the decision is not intrinsically unreasonable, and it may not improbably be followed.

Infants.

5. There is a *dictum* of Lord Eldon in *Lord Compton* v. *Oxenden*, 2 Ves. 261, at p. 264, which seems to imply that merger would be prevented in equity for the benefit of an infant. This remark is founded upon a case, *Thomas* v. *Kemeys*, 2 Vern. 348, which has nothing to do with merger, but refers to the extinguishment of a daughter's portion in the inheritance descending upon her. The portion was secured by a term of years vested in trustees, so that merger was wholly out of the question. Here there is some likeness in principle between merger and extinguishment. See also *Forbes* v. *Moffatt*, 18 Ves. 384, where the question of the extinguishment of charges in the fee is treated as being a question of intention; and *Toulmin* v. *Steere*, 3 Mer. 210, as explained in *Adams* v. *Angell*, 5 Ch. D. 634, at p. 645, where note the words, "in the absence of any contemporaneous

Extinguishment.

expression of intention." Cases of the type of *Toulmin* v. *Steere* seem to depend upon the question of the extinguishment of charges in the fee, because the legal mortgagee may be said, by a release of the equity of redemption, to have obtained the fee in equity.

6. The point actually decided in *Brandon* v. *Brandon*, 31 L. J. Ch. 47, seems to have been, that the parties to an administration suit are estopped in equity from raising the question of merger between two estates, when, with the consent of all parties, the two estates have during a long series of years been treated by the court as being both in subsistence. The judgment contains *dicta* which would seem to go the length of laying it down, that in equity merger depends wholly upon intention.

Estoppel by acquiescence.

Quære as to intention.

CHAPTER XI.

RULES OF LIMITATION AT COMMON LAW.

It has been remarked above, that terms of years were unknown to the common law, which recognized no estate other than estates of freehold. (*Vide supra*, p. 46.) Since these latter were the only known estates, it follows that, in the eye of the common law, the person having the first vested estate of freehold was necessarily the person who was, for the time being, entitled to the actual possession of the land. Here *possession* is synonymous with *seisin*, and it is perpetually used in this sense by the older writers on the law. In the case of writers who wrote before the statute 21 Hen. 8, c. 15, this usage is so obviously natural as to require no explanation; and later writers long retained the language which had become the customary exponent of the law's meaning. When the estate of the termor for years had been made practically indefeasible by statute, the old legal theory, that he had no seisin in him, but held the land only in right of the seisin of the reversioner, remained undisturbed.

Definition of seisin.

Seisin may therefore be defined to be a possession of land founded upon the title given by an estate known to the common law; or, which is the same thing, by an estate of freehold. (Co. Litt. 17 a.) As the origin and primitive status of terms of years fell into oblivion, the word possession gradually acquired a more extended meaning than the word seisin. It is now commonly used to mean any possession which is founded upon any title which the law, as now administered, will recognize and protect.

The actual seisin.

When a number of successive vested estates of freehold are derived out of the same original estate, the tenants of all such estates, though only one of them can at one time be vested in possession, are said to be *in of the same seisin*. The first in order of the estates, which is vested in possession as well as in interest, is said to confer the right to the *actual seisin* or *immediate freehold*.

Mere freehold distinguished from inheritance.

Any estate which, if vested in possession, would give the right to the immediate freehold, but which imports no inheritance, is styled an estate of *mere freehold*. The only estates of this nature are estates for life (including tenancy in tail "after possibility") and estates *pur autre vie*.

In what sense a remainder of freehold is said to subsist after a term of years.

The seisin is quite independent of, and unaffected by, the existence of any term or terms of years. Therefore, so far as the seisin is concerned, there can exist no such thing as a remainder of freehold *expectant upon* a term of years. The existence of a prior term of years does not prevent the first vested estate of freehold from being an estate of freehold in possession. (*Boraston's Case*, 3 Rep. 19; see what is said at p. 21a about the estate of the executors, and connect this with the fact, that judgment was given for the defendant. See also Litt. sect. 60, where the words, "If the termour in this case entreth before any livery of seisin made to him, then is the freehold and also the reversion in the lessor," show the same thing.) During the continuance of the term, the estate of freehold is properly described, not as being a *remainder of freehold expectant upon* the term of years, but as being the *freehold in possession subject to* the term. But since the possession of the freeholder is in such a case subject to the rights of the termor, and since these rights may, and in practice usually do, deprive the freeholder of the immediate use and occupation of the lands during the term, the result is, for many practical purposes, much the same as if the freehold subsisted only as a veritable remainder. In this sense the word *remainder* is often applied to estates of freehold limited after a term of years. But when this language is used, the reader must bear in mind, (1) that a prior term of years does not prevent a subsequent vested estate of freehold from being an estate of freehold *in possession*; and (2) that a prior term of years does not prevent a subsequent contingent estate of freehold from being void in its inception, as being an attempt to create a freehold *in futuro*.

By the common law, the tenant of the immediate freehold was the only person against whom a writ could be brought in a

The seisin cannot be placed in abeyance by act of parties.

real action, or from whom the lord could demand the feudal services incident to the tenure; and in ancient times this was equivalent to saying that, during abeyance of the immediate freehold, all rights, both public and private, in reference to the land, were in abeyance also. This sufficiently explains the common law rule, that every act of parties is void, by which, if it were taken to be valid, the immediate freehold would be placed in abeyance. The strictness of this rule is absolute: under no circumstances whatever, by the common law, can the immediate freehold be placed in abeyance by any act of parties. (1 Prest. Est. 216.) From this rule some very important consequences are deduced, with regard to the limitation of estates at common law.

Sometimes placed in abeyance by operation of law.

But by unavoidable necessity, the immediate freehold might be placed in abeyance by operation of law. In the case of a corporation sole seised of lands, during the interval between the death of one incumbent (or other cause of a vacancy) and the accession of his successor, the immediate freehold is in abeyance. (Litt. sect. 647.) And on the death of a tenant *pur autre vie*, whose estate was barely limited to him by name (without any mention of the heirs) during the life of *cestui que vie*, the immediate freehold was, by the common law, in abeyance, unless or until some person had, or obtained, such a possession as caused the freehold to be cast upon him by the title of general occupancy. (Co. Litt. 342 b.)

The seisin perhaps placed in abeyance by statute.

By the provisions of several statutes, the immediate freehold may, under certain circumstances, be placed in abeyance. At common law a contingent remainder was destroyed, unless it became vested in interest either previously to, or *eo instanti* with, the determination of the precedent estate of freehold; because the immediate freehold would otherwise have been in abeyance pending the contingency. The statutes above referred to provide that, subject to certain restrictions, contingent remainders may take effect, notwithstanding the determination, pending the contingency, of the precedent estate of freehold; but they omit to make any provision for the vesting of the freehold during the

interval. (For an account of the said statutes, and remarks upon their operation, see pp. 109, 111, 112, *infra.*)

The impossibility, at common law, of causing any abeyance of the immediate freehold by any act of parties is the foundation of several of the rules regulating the limitation of legal estates. These rules remain valid at the present day, except in so far as their operation, in respect to the liability of contingent remainders to destruction, has been restricted by the statutes above referred to.

Exemption of executory limitations.

But it must be borne in mind that the rules of limitation which depend upon the necessity for a continuous seisin do not necessarily apply either to assurances taking effect by the Statute of Uses, or to wills, because limitations which, in a common law assurance, would place the freehold in abeyance, would not necessarily place it in abeyance if contained in an assurance by way of use or in a will. In the case of executory devises, the seisin may descend, during the unappropriated interval, to the testator's heir-at-law; and in the case of springing and shifting uses, it may remain, during any such interval, in the grantees to uses. At the present day, assurances at the common law rarely occur in practice; and it follows that the practical application of the rules in question is not of wide extent. Their application is probably restricted in practice to leases for lives, which, when granted by an absolute owner, whether an individual or a corporation, are commonly granted in the shape of common law leases,* as distinguished from leases which take effect by the Statute of Uses. Nevertheless, it is necessary that the rules relating to abeyance of the seisin should be not only known, but intimately known, to every conveyancer

* Even these leases are not, strictly speaking, common law assurances; for they are in practice made by grant under 8 & 9 Vict. c. 106, s. 2, whereas at common law they would need livery of seisin. But this point is not material to the present distinction, for such statutory grants seem to be amenable, in all other respects, to the rules which govern common law assurances. In the same sense, it might also be said that conveyances in fee simple, expressed to be made "unto and to the use of" the grantee—which often occur in practice—are common law assurances, since they do not take effect by the Statute of Uses. But the form of such assurances does not offend against the present rules.

who aspires to possess more than an empirical acquaintance with his art.

The bearing of these rules upon perpetuities.

Of the rules stated in this chapter, the first four depend upon the doctrine of abeyance of the seisin. The remaining two were designed to prevent the creation of what in modern times is styled "a perpetuity," by the limitation of remote estates to unborn persons as purchasers. The latter rules are the ancient counterpart at common law of the modern rule against perpetuities; and they fulfil a function, in respect to legal limitations, similar to that of the rule against perpetuities in respect to executory limitations.

Lord Brougham pointed out, in *Cole* v. *Sewell*, 2 H. L. C. 186, at p. 232, that the rule forbidding abeyance of the seisin also directly tended to prevent the creation of perpetuities, by preventing the existence of any interval between the determination of a particular estate and the commencement in possession of the remainder:—"If it may be for one year after the life of A. terminates, it may be for a thousand years, and so it might end in a perpetuity." This observation is marked by the greatest acumen. But the rule was founded historically, long before any such reasons had been thought of, upon the above-mentioned grounds relating to feudal services and writs in real actions: matters which, at the time of the rule's origin, were of such immense practical importance, that nothing further is needed to explain its rigorous enforcement.

RULE 1.—Any limitation by which an estate of freehold in corporeal hereditaments purports to be so granted as to commence, either upon the expiration of a fixed interval of time after the execution of the assurance, or upon the happening of some future contingency other than the determination of a precedent estate of freehold, is void in its inception. (*Barwick's Case*, 5 Rep. 93, at p. 94 b; *Buckler's Case*, 2 Rep. 55; *Hogg* v. *Cross*, Cro. Eliz. 254; 10 Vin. Abr. 206 = *Estate*, B. pl. 10; *ibid.* 208, pl. 26; Plowd. 156; 2 Bl. Com. 165; 1 Prest. Est. 217.)

An estate of freehold so limited is often styled a freehold *in*

futuro; and the above rule is often summarized by the statement, that the limitation of a freehold *in futuro* is void. There are three kinds of limitations, which come directly under the description of a freehold *in futuro*:—

Three kinds of freehold *in futuro*.

(1) A vested estate, not preceded by another estate, limited to commence after the expiration of a fixed interval, or upon the happening of a contingency;

(2) A vested estate limited subsequently to another estate, but with an interval of time to elapse between its commencement in possession and the determination of the precedent estate; and

(3) A contingent remainder not immediately preceded by a vested estate of freehold.

In the recent case of *Boddington* v. *Robinson*, L. R. 10 Exch. 270, the validity of the above-stated rule was expressly admitted; though, by a strained construction of the deed which was there in question, the legal consequences of the rule were avoided. But this admission of the rule's validity is subject to the extraordinary suggestion, which seems to have been made *arguendo* in that case as to the effect of 8 & 9 Vict. c. 106, s. 6, upon which the court pronounced no opinion. (*Vide infra*, p. 86.)

Reason of the rule's connection with common law assurances.

The existence of this rule is intimately connected with the view taken by the common law of the common law assurances, and particularly of a feoffment. In the view of the common law, a feoffment necessarily devested the seisin, forthwith and during the whole time comprised in the estate or estates to which it referred, out of the feoffor. Unless, therefore, the feoffment purported, forthwith and for the whole of that duration, to vest the seisin in the feoffee, it would follow that, during some unappropriated interval, the actual seisin or immediate freehold would be placed in abeyance.

Whether the supposed unappropriated interval had its existence at the beginning, or somewhere in the middle, of the period for which the seisin was taken out of the feoffor by the feoffment, makes no difference to the ultimate result. In either case, supposing the limitation to take effect, the actual seisin would, sooner or later, be placed in abeyance. There-

fore, estates of freehold *in futuro*, unpreceded by any other estate, and remainders (as they may be called) *in futuro*, separated by an interval of time from the precedent estate, are, at common law, both equally void in their inception.

Application of the rule to contingent remainders.

The case of a contingent remainder, provided that in its inception it is preceded by an immediate estate of freehold, differs from what is above styled a remainder *in futuro*; because, though such a contingent remainder might by possibility place the immediate freehold in abeyance, the terms of its limitation do not exclude the possibility that it may take effect without causing any such abeyance. Therefore, while a remainder expressly limited *in futuro* is void in its inception, the contingent remainder is (at common law) void only in case the possible mischief should actually arise; that is, in case the precedent estate of freehold should determine before the vesting of the contingent remainder by the happening of the contingency.

The rule applies to all common law assurances, by which a freehold can be conveyed.

The rules of limitation which are derived from the rule against abeyance of the freehold, are not confined to assurances made by feoffment, though their origin is closely connected with the mode in which a feoffment is supposed by the law to operate. They have always been held to apply also to all other assurances by which, at common law, estates of freehold may be limited or conveyed; namely, as regards corporeal hereditaments, fines, recoveries, releases, and confirmations by way of enlargement; and, as regards incorporeal hereditaments, to grants.

The release in the old-fashioned assurance styled a "lease and release," is a release operating at common law by way of enlargement of the estate created by the lease. Therefore, any estate *in futuro*, purporting to be created by lease and release, is void, no less than such an estate purporting to be created by feoffment. (*Roe* v. *Tranmarr*, Willes, 682; 2 Wils. 75.)

A covenant to stand seised to uses in consideration of blood or marriage, is not a common law assurance; and the present rule does not apply thereto. (*Ibid.*)

Exchanges.

Perkins (sect. 265) expressly declares, that the rule is not binding upon common law exchanges, in the sense that an

exchange may be made to take effect after the expiration of a definite interval of time. It is also laid down in Shep. T. 293, that an exchange may be made of a definite parcel of land for either of two others at the election of the other party; and that upon election being made, the exchange is good: which approaches nearly to the doctrine of Perkins. Preston questions the truth of Perkins' doctrine, but does not expressly deny it (1 Prest. Est. 217, note *d*); and in his addition to the Touchstone, he appears to accept the doctrine there laid down. Common law exchanges seldom, if ever, occur in modern practice; and therefore the question is of little practical importance. But they seem, upon principle, to come within the mischief which the rule was originally designed to prevent; for if the seisin might thus have been shifted at a future day, any writ brought by the demandant in a real action during the interval, might have abated to his prejudice.

The rule does not operate until the assurance is perfected.

A feoffment takes effect from the livery of the seisin, not from the execution of any accompanying deed or charter. Therefore, if the deed should purport to limit a freehold *in futuro*, but the livery of seisin should not in fact be made until after the preliminary interval has expired, the feoffment will be good; because the estate conveyed commences from the feoffment, and does not under such circumstances commence *in futuro*. (1 Prest. Est. 222; 10 Vin. Abr. 205 = *Estate*, B. pl. 4; 13 Vin. Abr. 193 = *Feoffment*, T. 2, pl. 1.)

Similarly, an assurance by deed, which needs no livery, takes effect from the delivery of the deed. Accordingly, in an assurance by lease or release, or in a lease made by grant under 8 & 9 Vict. c. 106, of lands for life or lives, if the estate limited should purport to be a freehold *in futuro*, but the deed (though previously sealed) should not be delivered until after the expiration of the preliminary interval, the deed will be good and the estate will take effect. (1 Prest. Est. 222.)

From what day a lease commences.

A lease made to a man *habendum* from the day of its date during specified lives does not include the day of the date, but commences from the following day. Such a lease, being for a freehold, could not take effect without livery of seisin previously

to the 8 & 9 Vict. c. 106. If the livery had been made on the day of the date, this would have been for a freehold to commence from the following day; and therefore it would have been void, under the above-stated rule. (10 Vin. Abr. 204 = *Estate*, B. pl. 1, 2.)

Statutory grants.

And it is conceived that such a lease made at the present day, which by virtue of 8 & 9 Vict. c. 106, s. 2, will take effect by delivery of the deed without livery of seisin, if the deed should be delivered upon the day of the date, would be void as purporting to create a freehold *in futuro*. There can scarcely be a doubt (apart from the suggestion, shortly to be discussed, touching the effect of 8 & 9 Vict. c. 106, s. 6) that this is the law, though at this day the courts would be very reluctant to enforce it. Conveyances by way of grant are so far from enjoying any exemption from the rule, that, on the contrary, they are more obnoxious to its severity even than conveyances which take effect by way of livery. The grant of any estate *in futuro*, when it takes effect only by the grant, is necessarily and absolutely void; whereas a charter of feoffment which purports to grant a freehold *in futuro* is not necessarily void, but will be good if the livery is deferred until after the expiration of the interval of abeyance. (10 Vin. Abr. 207 = *Estate*, B. pl. 21, 25.) But, as above mentioned, a deed of grant will be good, if the delivery,—that is, in effect, the execution,—be deferred until after the expiration of the forbidden interval.

Remarks upon the case of *Boddington* v. *Robinson*, L. R. 10 Exch. 270.

In *Boddington* v. *Robinson* a lease which purported to create a freehold *in futuro*, having been drawn by an incompetent draftsman, happened to contain some absurd and superfluous expressions. The court, being very desirous to escape from declaring the lease void, made use of these absurdities to impute to the deed a legal operation which, in respect to the time of the term's commencement, was manifestly not the intention of the parties.

In that case the material facts were as follows:—A. being tenant for his own life of a house, by a deed, dated, and presumed to be delivered, on the 10th November, 1864, purported to grant, demise, and lease *to B. his executors, administrators, and assigns*, the house in question, to have and to hold the same

from the 13th of November [sic] *for the term of the aforesaid A. for the term of his natural life.* This lease therefore purported to create, on the 10th November, 1864, an estate *pur autre vie* to commence from the 13th day of some undefined month of November; but from certain circumstances connected with the dealings with the house which had taken place, the court inferred that the intended year was the year 1874. The principal question was, whether this was void, as being a freehold *in futuro* purporting to be created by what is for this purpose a common law assurance.

The court held that the words contained in the premisses were sufficient expressly to pass the whole estate of A., and that they were not cut down by the words contained in the *habendum* importing the omission of the interval between the 10th November, 1864, and the 13th November, 1874. It followed that, in the opinion of the court, the freehold created by the deed was an immediate freehold and not a freehold *in futuro.*

The reasoning upon which this conclusion was based seems to consist of two propositions. The first imports that an express estate contained in the premisses of a deed, and which is capable of taking effect by virtue of the deed without any such extraneous ceremony as livery of seisin, is not liable to be abridged or avoided by anything contained in the *habendum:* a proposition which has for a very long time past been settled beyond question. (*Vide infra*, p. 333.) The second proposition (which is much more dubious) imports, that the addition of the words, "his executors, administrators, and assigns," to the name of a grantee, will, when the grantor has an estate for his own life, expressly convey the whole estate of the grantor to the grantee. This second proposition seems to be a purely arbitrary proposition, unsupported by any shadow of authority, which seems to have been invented expressly to suit the exigencies of the particular case.

The only reason, or semblance of a reason, alleged in favour of the second proposition was, that the words, "his executors, administrators, and assigns," are "proper words of limitation" for granting the whole of the estate of the grantor *in præsenti.* But this statement seems to be very arbitrary doctrine. There exists no authority to show that those words, unaccompanied by

the words, "during the life of the grantor," would have any such effect. And the last-mentioned words would have that effect, without any need for the mention of executors, administrators, or assigns. This was, in fact, a material part of the grounds upon which general occupancy was permitted by the common law; because the assignor or grantor, *having parted with the whole estate* during the life of *cestui que vie*, had himself no better right to enter upon the lands, after the grantee's death, than anybody else had.

Suggestion as to 8 & 9 Vict. c. 106, s. 6, made *arguendo* in *Boddington* v. *Robinson*.

It is to be regretted that the arguments of counsel are not given in the above cited report. An extraordinary suggestion seems to have been made, in argument, that 8 & 9 Vict. c. 106, s. 6, has in effect repealed the rule of law now under consideration, and that it authorizes the creation *de novo* of a freehold *in futuro* by a common law assurance. But it is conceived that the language of that enactment manifestly refers only to the conveyance of "future interests" which are already *in esse*, as subjects of limitation—that is, contingent remainders and executory interests; and that it has no reference to the creation *de novo* of anything whatever. In the discussion of this subject the phrase, freehold *in futuro*, has acquired a peculiar significance, and the phrase, future interest, is never used in the same meaning. The suggestion above referred to seems, in fact, to be a mere inept playing upon words. The court in *Boddington* v. *Robinson* declined to consider this question, upon the ground that, in view of their opinion upon the other point, it was not material to the decision.

Reasons for rejecting the above-mentioned suggestion.

The following reasons (if any be required in addition to the apparent scope of the Act's language) for rejecting the suggested interpretation of 8 & 9 Vict. c. 106, s. 6, seem to be conclusive. If that interpretation were correct, its effect could hardly be restricted to the particular case which happened to suit the convenience of the defendant in *Boddington* v. *Robinson*. The result would be that, independently of 40 & 41 Vict. c. 33, no reason would any longer exist, why a contingent remainder should be destroyed by the expiration of the precedent estate of freehold pending the contingency. But nobody has ever sug-

gested that the last cited statute is superfluous, so far as regards contingent remainders created by instruments coming into operation after 1st October, 1845. In *Brackenbury* v. *Gibbons*, 2 Ch. D. 417, which was decided more than thirty years after the passing of 8 & 9 Vict. c. 106, Vice-Chancellor Hall, who was probably the most learned judge of his day in respect to such matters, assumed that the common law rule was applicable to contingent remainders created by a will dated in 1854. In *Re Lechmere and Lloyd*, 18 Ch. D. 524, the late Master of the Rolls, Sir G. Jessel, evidently made the same assumption, though he thought that, upon the wording of the instruments under consideration, the limitations in both cases gave rise to executory interests, and not to contingent remainders. (See also *Cunliffe* v. *Brancker*, 3 Ch. D. 393.) Moreover, if such contingent remainders as are not within the protection of 40 & 41 Vict. c. 33, are by 8 & 9 Vict. c. 106 protected against destruction by expiration of the precedent estate, then, since neither statute makes them liable to the rule against perpetuities, a curious opportunity might be opened to the ingenuity of conveyancers.

RULE 2.—Any similar limitation of an estate of freehold derived out of a remainder or reversion, expectant upon a particular estate of freehold, is likewise void in its inception. (*Barwick's Case*, 5 Rep. 93, at p. 94 b; *Buckler's Case*, 2 Rep. 55; *Swyft* v. *Eyres*, Cro. Car. 546; 10 Vin. Abr. 206 = *Estate*, B. pl. 9; 1 Prest. Est. 219.)

Such limitations are manifestly identical in principle with limitations of a remainder *in futuro*, derived out of an estate in possession, leaving an unappropriated interval between the determination of the precedent estate and the vesting in possession of the remainder. To them applies the same criticism, that they not only contemplate *ab initio* the possible abeyance of the freehold, but also (unlike contingent remainders) are such that they could not possibly take effect as estates in possession without the occurrence of such an interval of abeyance.

RULE 3.—Any similar limitation of an estate of freehold in any incorporeal hereditament, already

in esse at the time of the limitation, is void in its inception. (1 Prest. Est. 217.)

This rule points out the distinction between the creation *de novo* of incorporeal hereditaments, and subsequent dealings with them when they have been created. The grantor, who limits *de novo* a rent-charge in fee simple out of his lands, is not bound by the foregoing rule; but it binds the grantee, in regard to any conveyance, or settlement, which he may subsequently make of the rent-charge.

In respect to some incorporeal hereditaments, such as a rent-charge, this rule seems rather to have been imposed by analogy, and in order to secure uniformity in the law, than from any direct reason; for it is evident that the abeyance of a rent-charge has no tendency to put in abeyance the seisin of the land out of which it issues, and the terre-tenant would always be available for the purpose of bringing an action to recover the rent on the part of any person who conceived himself to have a claim thereto, and would be the proper person against whom to bring it. But in respect to certain other incorporeal hereditaments, such as an advowson in gross, the analogy of the reason against abeyance of the seisin of the land holds good; for during an abeyance of the seisin of the advowson, the claimant would have no one against whom to bring his action. If a usurper had presented to the benefice, and his clerk had been admitted and instituted, the rightful patron would have been without remedy, so long as the abeyance, if permitted to exist, had continued.

Limitations *de novo* not within the rule.

When an incorporeal hereditament, as a rent-charge, is created *de novo*, it may be limited to commence at a future time; and such future time may either be a specified time, or it may be ascertainable by the happening of a contingency. (See Plowd. 156, where the authorities are collected in the margin, note *c*.)

RULE 4.—No estate of freehold, whether in corporeal hereditaments, or in incorporeal hereditaments already *in esse*, can be limited, or caused, to exist at intervals

only and not continually. (*The Prince's Case*, 8 Rep. 14, see p. 17 a; *Corbet's Case*, 1 Rep. 83, see p. 87 a, b; Prest. Shep. T. 127; 19 Vin. Abr. 494 = *Statute*, A. 2, pl. 6; 4 Com. Dig. 5; 1 Prest. Est. 218.)

It is in consequence of this rule that a determinable fee in lands, limited to a man and his heirs, *being peers of the realm*, is absolutely determined by any separation occurring between the peerage and the heirship, and the estate will not revive in case the peerage and the heirship should subsequently become united in the same person. (*Vide infra*, p. 201, No. 1.)

But an incorporeal hereditament, as a rent-charge, may, at its creation, be limited to arise and fall into abeyance or extinction by alternate intervals; just as, at its creation, it may be limited to arise after the expiration of a specified time.

Of this type is the curious limitation mentioned by Lord Hale in note 6 on Co. Litt. 27 a:—"The hospital of Saint Katharine was founded by Queen Eleanor, wife of Hen. 3, reserving the patronage *sibi et reginis Angliæ pro tempore existentibus, et eo titulo regina Philippa uxor* E. 3, *habet patronatum.*" Such limitations are sometimes styled *desultory limitations*. See the case of *Atkins* v. *Mountague*, 1 Ch. Ca. 214, in which this limitation was held to be good. It was from this case that Lord Hale derived the above cited note.

Desultory limitations.

The last cited case is supported by the authority of Lord Hale. Yet it has some features which prevent it from being regarded with unmixed satisfaction. Desultory limitations made upon the creation *de novo* of an incorporeal hereditament, are not unknown to the law; but the other authorities, unlike *Atkins* v. *Mountague*, seem to assume that a limitation of this kind must be such that, if it had not been desultory, it would have been the limitation of a fee. In the present case, the limitation was in favour of a merely arbitrary series of persons who are capable, indeed, of being intelligibly described, but are not connected together in any of those ways which are requisite to the limitation of a fee. Though for some purposes the Queen Consort is in law a feme sole (Co. Litt. 3 a, *ibid.* 133 a), yet there seems to be no authority for saying that she is a corporation sole. Nor

Remarks upon *Atkins* v. *Mountague*.

could Lord Hale have supposed that the Queen Consort is a corporation sole; for he expressly laid it down, that such a desultory limitation of an advowson *in esse* would be bad; whereas, if the Queen Consort were a corporation sole, there could be no more harm in the limitation of an advowson to her and her successors, than in its limitation to a bishop and his successors. The successive Queens Consort, being neither the successors of a corporation sole nor the heirs of any specified person or persons, are not a proper subject for the limitation of a fee; and it would be difficult to defend the principle of the above cited decision, without maintaining that a similar desultory limitation might lawfully be made in favour of any arbitrary series of persons who are capable of being intelligibly described.

Descent of peerage among co-parceners.

In a similar manner, a peerage, if descendible to females, will, by act of law, fall into abeyance upon a descent among co-parceners. The crown enjoys the undoubted prerogative, to revive any such dormant peerage in favour of any one of the persons among whom, for the time being, the right is distributed. (Co. Litt. 165 a, and Harg. notes 6, 7, thereon.)

Offices held in grand serjeanty.

An office of honour, held by what, previously to 12 Car. 2, c. 24, was tenure in grand serjeanty, does not fall into abeyance among coparceners; but how, upon such a descent, it should be exercised, has been a matter of doubt. Lord Coke held, that the husband of the eldest coparcener was entitled, as of right. But it seems now to be settled, that such office must be exercised by a deputy appointed by all the coparceners, such deputy not being below the degree of a knight, and being subject to the approval of the crown. (Harg. n. 8 on Co. Litt. 165 a.) On the appointment of deputies in lieu of persons for any cause disqualified, see Co. Litt. 107 b.

RULE 5.—If *in a deed* there are two limitations, one to an unborn person and the other (by purchase) to any issue of such unborn person, the second limitation is void. And all limitations subsequent to such void limitation are also void. (2 Prest. Abst. 114, 115; Fearne, Cont. Rem. 502, and Posth. Works, 215; *Brudenell* v. *Elwes*, 1 East, 452, at p. 453; *Monypenny*

v. *Dering*, 2 De G. M. & G. 145, at p. 170; *Hay* v. *Earl of Coventry*, 3 T. R. 83, at p. 86.) If *in a will* there are two such limitations, the prior limitation (whether it be executed, or executory) may be construed as a limitation in tail, provided that such a limitation would, if not barred, carry the estate by descent to the issue specified in the second limitation. (2 Prest. Abst. 166; Butl. note on Fearne, Cont. Rem. 204; *Parfitt* v. *Hember*, L. R. 4 Eq. 443; *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 93.)

It is clear from the above cited authorities, that a limitation, in a deed, to an unborn person for life is good; and that a remainder may be limited upon such life estate, though not to the issue of such tenant for life.

Cy près doctrine.

The construction of a prior life estate in a will as an estate tail, is made in order to give effect to the apparent intention of the testator, so far as the rules of law will permit; and it is therefore commonly referred to as the *cy près* doctrine. The quality of the estate tail is regulated by the quality of the issue who are the subjects of the second limitation. The doctrine is not likely to be extended. (Butl. *ubi supra.*)

RULE 6.—The limitation of a remainder to a corporation not *in esse*, or to the right heirs, as purchasers, of a person not *in esse*, is void. (*Cholmley's Case*, 2 Rep. 50, at p. 51 a, b; 2 Bl. Com. 170.)

The authorities declare that such a limitation is void in its inception, even though a corporation answering to the description should be created, during the continuance of the precedent particular estate; or though a person answering to the description should come into being, and leave an heir at the time when the estate to arise under the limitation would fall into possession: wherein it differs from the limitation of a contingent remainder to the heirs (though not yet in being) of a person *in esse*, or to the unborn son of a person *in esse*. (*Vide infra*, p. 103.)

The rule is avowedly founded upon the maxim, that the law will not contemplate a double possibility, or a possibility upon a possibility. (Co. Litt. 25 b; *ibid.* 184 a; 1 Rep. 156 b; 10

Rep. 50 b.) This maxim has certainly been applied with very little consistency. Shortly before insisting upon it, Lord Coke states that a limitation in special tail to a married man and a married woman (other than his wife) is good, upon the ground that the wife of the man might die in his lifetime, and the husband of the woman in her lifetime, whereupon the marriage of the donees might ensue: though this hypothesis has mightily the aspect of a *triple* (not to say a *quadruple*) possibility. (See Co. Litt. 25 b.)

The maxim against double possibilities has been questioned by Lord Nottingham. (*Duke of Norfolk's Case*, 3 Ch. Ca. 1, at p. 29.) It does not clearly appear whether he meant to question the maxim altogether, or only the particular application of it (by Popham) above cited, at 1 Rep. 156 b. His remarks, at all events, only go to show, not that the instances alleged by Lord Coke are wrong, but that the maxim probably means something different every time it is cited. Though the maxim may be of such vague import, that it could not safely be relied upon for any new inference, yet there is not much reason to doubt that the above-stated rule would be enforced, if the occasion should arise; seeing that it only affirms the natural tendency of the courts, which leans strongly against the validity of remote and unusual limitations.

The maxim against double possibilities, when rightly viewed, is nothing worse than a somewhat clumsy restriction upon the remoteness of legal limitations; and some of the criticisms which have been passed upon it are much more foolish than the maxim itself.

CHAPTER XII.

CONTINGENT REMAINDERS.

Must be supported by estate of freehold in their inception.

The particular estate preceding a vested remainder of freehold may be a term of years; and in that case the seisin, during the continuance of the term, is vested in the remainderman. (*Vide supra*, p. 61.) But the particular estate preceding a contingent remainder of freehold may not be a term of years; because in such case the seisin would not be vested, but would be in abeyance during the continuance of the contingency. (*Goodright* v. *Cornish*, 1 Salk. 226.) Such a contingent remainder would be void in its inception, for want (as the common phrase goes) of a sufficient estate of freehold to *support* it. It is conceived that this is still the law.

Executory limitations need no support.

But such a limitation, though void as a remainder at common law, and therefore necessarily void if contained in an assurance which takes effect only by the common law, may be good as an executory limitation, if contained in an assurance which takes effect under the Statute of Uses, or in a will. In the former case it will be a springing use, and in the latter case it will be an executory devise.

Must also, by the common law, be supported pending the contingency.

For the same reason, every contingent remainder of freehold must, by the common law, be supported by an estate of freehold, not only in its inception, but also throughout the pending of the contingency; because, if any interval had been permitted to exist between the determination of the precedent estate and the vesting of the remainder, the immediate freehold would have been in abeyance during such interval. Unless the remainder, by the happening of the contingency, becomes vested, either previously to, or at the same instant with, the determination of the precedent particular estate, it is (by the common law) destroyed. But this liability to destruction has been greatly modified by recent legislation, as hereinafter mentioned.

Various modes of their destruction.

Any determination of the precedent particular estate pending the contingency would at common law have destroyed the remainder, whether such determination were due to the natural expiration, or to the forfeiture, surrender, or merger of the precedent estate. But in order that a merger of the precedent estate in a subsequent vested remainder of inheritance, might destroy the contingent remainder, it was necessary that the merger should take place subsequently to the creation of the precedent estate. (*Vide infra*, p. 108.)

The word *failure* is in this connection more strictly proper to be used than the word *destruction*, but the use of the latter word is common and convenient. The effect of the destruction or failure of a contingent remainder is to accelerate the next vested estate. (*Goodright* v. *Cornish*, 1 Salk. 226.)

How far a devested estate would support a contingent remainder.

Determination of the precedent estate by natural expiration, or by forfeiture, surrender, or merger, is an absolute determination of such precedent estate. A contingent remainder was also destroyed at common law, if the precedent estate, instead of being absolutely determined, was so far devested as to be turned to a *right of action*, which required a real action to restore its existence as an estate. If the precedent estate was devested only so far as to be turned to a *right of entry*, it was deemed to be still sufficiently in existence for the purpose of supporting contingent remainders. (Fearne, Cont. Rem. 287.) Thus, the disseisin of the tenant of the precedent estate would not alone have sufficed to destroy any subsequent contingent remainders; but if, by a descent cast, the right of entry of the disseisee had been tolled whereby his right became a right of action, the subsequent contingent remainders would have been destroyed. Hence it is commonly said, that a right of entry was sufficient, at common law, to support a contingent remainder, but that a right of action was not.

The liability to destruction is independent of the mode in which the remainder arises.

The above stated rules, that every contingent remainder of freehold must in its inception be supported by a precedent estate of freehold, and must vest at a time not later than the determination of the precedent estate, are equally applicable to all contingent remainders, whether they be created by limitations

taking effect by the common law, or by limitations which take effect under the Statute of Uses. (Fearne, Cont. Rem. 284; *ibid.* 324.) And also, if the limitation is by devise. (*Mansell* v. *Mansell*, 2 P. Wms. 678; see p. 682.) It was assumed in the last cited case, that contingent remainders created by devise are liable to destruction, the question being, whether trustees who had concurred to destroy them were guilty of a breach of trust. Their liability to destruction has never been questioned. (*Cunliffe* v. *Brancker*, 3 Ch. D. 393.)

The last preceding paragraph is not inconsistent with the above stated proposition, that a limitation which would be void *in its inception* as a contingent remainder, may be good as an executory limitation if contained in an assurance by way of use or in a testament. The words in italics are emphatic. If the limitation is, in its inception, capable of taking effect as a remainder, it will be construed as a remainder, under whatever kind of assurance it may arise. (*Vide infra*, p. 96.) And if it has once taken effect as a remainder, it cannot afterwards be construed as an executory limitation, in order to preserve it from a subsequent liability to destruction.

Equitable contingent remainders not liable to destruction.

The foregoing rules were not applicable to contingent remainders limited out of an equitable fee, when the legal fee was conveyed to trustees by the same instrument. (Fearne, Cont. Rem. 304, 305; *ibid.* 321; *Berry* v. *Berry*, 7 Ch. D. 657; *Abbiss* v. *Burney*, 17 Ch. D. 211, at p. 229; *Marshall* v. *Gingell*, 21 Ch. D. 790.) Nor were they applicable to contingent remainders limited out of an equity of redemption, the legal estate being in a mortgagee. (*Astley* v. *Micklethwait*, 15 Ch. D. 59.) In all such cases, neither a premature determination of the precedent estate, nor its natural expiration, before the vesting of the contingent remainder, would have hindered the latter from subsequently vesting. It is conceived that the principle of the last cited case extends also to contingent remainders limited out of an equitable fee not created by the same instrument: a case which seems never to have been expressly decided.

Copyholds.

In the case of copyholds, it is well settled that a premature determination, otherwise than by natural expiration, of the pre-

cedent estate, would not have hindered a contingent remainder from subsequently vesting. (Fearne, Cont. Rem. 319, 320; *Doe* v. *Martin*, 4 T. R. 39, at p. 64; *Roe* v. *Briggs*, 16 East, 406, at p. 413.) But in the above cited passage of Fearne, it is laid down, that if the precedent estate had determined by regular expiration pending the contingency, the contingent remainder would at common law have been destroyed.

Effect of the enfranchisement of copyholds.

If a particular estate and any remainder or remainders be subsisting in copyholds, and the copyholds are enfranchised by a conveyance, purporting to be in fee simple, from the lord to the tenant of the particular estate, the enfranchisement will enure to the benefit of the remaindermen, whose estates will thenceforward become freehold. But their estates, if contingent remainders, will lose the protection from destruction which they enjoyed so long as the freehold was in the lord. (*Roe* v. *Briggs*, 16 East, 406.)

How far liability to destruction still exists.

For some further discussion of the particular circumstances, under which a contingent remainder of freehold is liable to destruction at common law, *vide infra*, p. 107. The liability to destruction by reason of the forfeiture, surrender, or merger, of the precedent estate, or by reason of its being turned to a mere right, has been, either directly or indirectly, abolished by statute. For a long time before its express abolition, it had been to a great extent practically counteracted, by the introduction of trustees to preserve contingent remainders into settlements. The liability to destruction by reason of the natural expiration of the precedent estate pending the contingency has been greatly mitigated; but it still affects contingent remainders created by instruments executed on or before the 2nd August, 1877, and contingent remainders which do not conform to the rules regulating the limitation of executory interests. (*Vide infra*, p. 112.)

No limitation is construed as executory which can take effect as a remainder.

In construing all instruments under which executory interests may arise, whether wills or conveyances to uses, it has long been the settled rule, that no limitation which is capable of taking effect at the common law shall be construed to take effect

as an executory limitation; and therefore, that no limitation shall be construed as an executory limitation which would be good in its inception as a remainder. (2 Prest. Abst. 153, 154.) The fact that a limitation may, in the common course of things, possibly, or even probably, fail, if construed as a remainder, under the rules regulating the vesting of contingent remainders, will not exempt it from this rule of construction. (Fearne, Cont. Rem. 395; see also *ibid.* 386; Smith on Executory Interests, p. 71, and cases there cited.)

All limitations subsequent to an executory limitation, are executory.

But a legal remainder cannot be subsequent to an executory limitation. (Fearne, Cont. Rem. 503, v.) This seems to be obvious. A remainder, being a legal limitation, could not possibly, by the rules of law, subsist as a remainder in expectancy upon a limitation which itself violates the rules of legal limitations. But nothing hinders an executory limitation from being subsequent to a legal remainder.

Application of the rule to a class.

If the limitation is in favour of a class, as to some of whom it will be good in its inception if construed as a contingent remainder, while as to others it fails in its inception if construed as a contingent remainder, and can take effect, if at all, only as an executory limitation, this will not generally suffice to exempt the limitation from the above-stated rule; and the limitation will take effect as a contingent remainder in favour of those members of the class as to whom it is good in its inception, and will fail as to the others. (*Festing* v. *Allen*, 12 M. & W. 279, at p. 301; *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417.)

Qualification of the rule, as to a class.

But in a will, if it is the clearly expressed intention of the testator that the whole of the members of the class shall take, this will enable the limitation to be construed as an executory devise, in order to let in those members of the class as to whom it would have necessarily failed in its inception if construed as a contingent remainder. (*Re Lechmere and Lloyd*, 18 Ch. D. 524; *Hallett to Martin*, 24 Ch. D. 624.) The importance of this distinction is much lessened by the recent legislation, whereby the common law liability of contingent remainders to be destroyed has, in a great measure, been removed.

In *Re Lechmere and Lloyd*, Jessel, M. R., expressed the opinion, that the case in *Brackenbury* v. *Gibbons* ought to have been distinguished from the case in *Rhodes* v. *Whitehead*, and that it did not, when properly considered, come within their principle, but rather within the principle laid down by himself in *Re Lechmere and Lloyd*. But he did not impugn the principle of *Rhodes* v. *Whitehead*, in respect to the cases to which it is applicable.

General characteristics.

All contingent remainders have this common characteristic, that they depend for their vesting upon the happening of some event, which is such that by possibility it may happen neither during the continuance of the precedent estate nor *eo instanti* with the latter's determination. (Butl. note *g*, at Fearne, Cont. Rem. 9.)

For a succinct statement of the true criterion between contingent estates and vested estates, see p. 56, *supra*.

Classification adopted by Fearne.

From certain motives of convenience, contingent remainders have been divided by Fearne, for the purpose of discussion, into the four following classes:—

1. Where the contingent event is the determination of the precedent estate in one, or some only, out of several possible ways;
2. Where the contingent event is an event which may by possibility never happen at all;
3. Where the contingent event is such that it must happen at some time, but possibly not until after the determination of the precedent estate;
4. Where the contingent event is the coming into being of a person not yet *in esse*, or the ascertainment of a person not yet ascertained.

First Class of Contingent Remainders.

Definition.

A contingent remainder is of the first class, when "the remainder depends entirely on a contingent determination of the preceding estate itself" (Fearne, Cont. Rem. 5); that is to

say, when the precedent particular estate is capable of being determined in more than one way; but the remainder is so limited as to become vested only in case the determination shall take place in one specified way, or in some only out of several specified ways.

Example.

For example, A. makes a feoffment to the use of B. till C. returns from Rome, and *after such return of C.* to the use of D. and his heirs. (See 3 Rep. 20 a.) By this limitation B. takes by implication an estate for his own life, which is by the limitation made determinable upon the return of C. This estate may, therefore, determine in either of two ways; either by the death of B. or by the return of C. But it is only in the event of the latter determination that the remainder of D. is limited to take effect. This remainder, pending C.'s return, is contingent; because if B.'s estate should be determined by B.'s death before the return of C., D. would not be duly qualified by virtue of the remainder to enter upon the possession.

In this class of contingent remainders, the remainder can never become vested during the continuance of the particular estate, because the event which is to vest the remainder will also determine the particular estate. The remainder can only become vested, if at all, *eo instanti* with the determination of the particular estate. Contingent remainders of the other three classes admit of becoming vested during the continuance of the particular estate; except certain limitations to the heirs of a living person, coming under the fourth class, where such person takes an immediately precedent estate for his own life.

The definition requires modification.

The definition above given is not, as it stands, entirely satisfactory. Its terms, if taken literally, seem to include the estate of trustees to preserve contingent remainders; which, both upon principle and authority, seems more properly to be included among vested estates than among contingent estates. This subject is further considered *infra*, pp. 115—117.

Second Class of Contingent Remainders.

Definition. A contingent remainder is of the second class, when the happening of an uncertain event, which has no connection with the determination of the precedent particular estate, and is such that it may by possibility never happen at all, is by the nature of the limitation to precede the vesting of the remainder. (Fearne, Cont. Rem. 6.)

Examples. For example, if lands be limited to the use of A. for life, remainder to the use of B. for life, and if B. shall die in the lifetime of A. then remainder to the use of C. for life, or in tail, or fee simple. Here the remainder to C. is not to take effect unless B. shall die in the lifetime of A.; and accordingly, so long as B. is living, C. is not duly qualified to enter upon the lands by virtue of his remainder, and the remainder is therefore contingent. If A. should die in the lifetime of B., the prescribed event would thereby be made impossible ever to happen, and the remainder to C. would never be capable of taking effect. As a second example, suppose lands to be limited to the use of A. for life or in tail, and if B. should come to Westminster Hall on a specified day, then to the use of C. in tail or in fee simple. Here also, unless and until B. shall have to come to Westminster Hall on the specified day, C. is not duly qualified to enter upon the lands by virtue of his remainder, and the remainder is therefore contingent. (Fearne, Cont. Rem. 7, 8.)

Third Class of Contingent Remainders.

Definition. A contingent remainder is of the third class when it is limited to take effect after the happening of an event, which is such that it must necessarily happen at some time, though it may by possibility not happen during the continuance of the precedent particular estate. (Fearne, Cont. Rem. 8.)

Examples. For example, if lands be limited to the use of A. for life, and after the death of B. to the use of C. in tail, or in fee simple.

Here, if A. should die in the lifetime of B., C. would not be duly qualified to enter upon the lands by virtue of his remainder, and the remainder is therefore contingent.

This class may be said to differ from the second class in two respects; namely, (1) the uncertain event is not an event which may by possibility never happen at all; and consequently, it does not admit of becoming impossible to happen during the continuance of the precedent estate; (2) the remainder is contingent only by reason of the rule of law which defeats a remainder upon the occurrence of any interval of time between the determination of the precedent estate and the vesting of the remainder; whereas, in the second class, the happening of the uncertain event is expressly made a sort of condition precedent to the vesting of the remainder.

Exception from the Third Class.

Distinguishing characteristic.

There is a certain class of limitations which, though in terms coming within the definition of the third class of contingent remainders, have been decided to be vested remainders. Such remainders, being vested, do not need to be supported by a precedent estate of freehold, but may be preceded by a chattel interest. This is, in fact, their distinguishing characteristic.

What limitations come within the exception.

A limitation to A. for twenty-one years, if B. should so long live, and after the death of B. to C. in tail, or in fee simple, would be an example of a contingent remainder preceded by a chattel interest. This remainder is of the third class, being limited to take effect after an event which, though it must happen at some time, may by possibility not happen during the continuance of the precedent estate; because B. might be living at the expiration of the twenty-one years. Such a limitation, if contained in an assurance at the common law, would therefore be void in its inception, as purporting to create a freehold *in futuro*. But if, instead of being a term only of twenty-one years, the precedent term is so long that there is no probability, or even no possibility, that B. will be living at the time of its expiration, it is not strictly true that the uncertain event, after

the happening of which the remainder is to take effect, may by possibility not happen during the continuance of the precedent estate. It has accordingly been decided that limitations in the above form, when the term of years is so long as to give rise to a vehement presumption, or a certainty, that it will not expire during a life then in being, are vested remainders. (Fearne, Cont. Rem. 21.) A term of eighty years, or upwards, will suffice to give this quality to the remainder. Such a remainder, though preceded only by a chattel interest, is therefore good, even in an assurance at the common law. In wills and assurances by way of use, such limitations may be good *quâcunque viâ*, either as remainders or as executory limitations.

The case of *Beverley* v. *Beverley*.

Cases might occur in which it would be material to consider the application of this doctrine, although, by reason that the limitation is contained in a will, there may be no question as to its validity; since it would be valid as an executory devise, if void in its inception as a remainder. In *Beverley* v. *Beverley*, 2 Vern. 131, a testator devised lands to his eldest son for the term of sixty years, if the son should so long live, and after the son's decease to a grandson in tail male. The son and grandson, after the testator's death, suffered a common recovery. Here there was no question as to the validity of the limitation to the grandson, but it was urged that the recovery was bad for want of a tenant to the *præcipe*, the freehold during the life of the son being (as they are reported to have said) in abeyance. This was a strange contention, the very ground upon which such executory devises are held good being, that they do not place the freehold in abeyance, but leave it to descend in the meantime to the heir at law. However, it appears that in this case, which is very badly reported, the legal estate was outstanding, and all the limitations were therefore equitable; so that the court had no difficulty in holding the recovery to be good as an equitable recovery. But the court seems to have thought that a term of sixty years would not be long enough to vest a subsequent contingent remainder.

If such a limitation should occur in a will at the present day, it might be material to inquire whether the estate tail arising under it should take effect as a remainder or as an executory

limitation, because upon the answer to this question would depend the whereabouts of the immediate freehold during the interval before the coming into possession of the estate tail. If the estate tail should be a remainder, it must necessarily be a vested remainder; and the immediate freehold during the precedent term of years would be vested in the tenant in tail. But if the limitation should be executory, it would seem that the freehold would in the meantime descend to the testator's heir general, who would not necessarily be the same person as the tenant in tail. And since, by virtue of the Fines and Recoveries Act, s. 22, an estate by way of resulting use or trust to or for the settlor, is deemed to be an estate under the settlement within the meaning of that section, for the purpose of constituting the protector of the settlement, it might for some purposes be material to inquire in which of these two persons the intermediate freehold is vested.

Fourth Class of Contingent Remainders.

A contingent remainder is of the fourth class when it is limited to a person not ascertained, or not in being, at the date of the limitation, but there is a possibility that a person to satisfy the description may be ascertained, or may come into being, during the continuance of the precedent particular estate. (Fearne, Cont. Rem. 9.) Definition.

For example, if lands be limited to the use of A. for life, remainder to the use of the right heirs of J. S. who is at that time living; or, remainder to the use of the first son of J. S. who at that time has no son; or, remainder to the use of the last survivor of several living persons. In all these cases it is evident that the remainder cannot vest until the ascertainment, or coming into being, of a person to satisfy the description in the limitation; and in the case of limitations to the heirs of a living person, such ascertainment can only take place *eo instanti* with his death; because, *Nemo est heres viventis.* Examples.

It might at first sight be thought that the remainder is vested in the heir presumptive or heir apparent; but as the heir is, by

the limitation, to take as a purchaser, and as the purchaser is to be the person who in fact comes within the description of heir, it is clear that the remainder cannot vest in the heir presumptive or apparent so long as his heirship remains only presumptive or apparent, because such a person may not, in fact, ever be the true heir at all, and therefore may never be qualified, under the terms of the limitation, to take the estate at all.

Exceptions from the Fourth Class.

Heir as *persona designata.*

In certain cases, a limitation of a remainder to the heirs of a living person, as purchasers, occurring in a will, has been held to be a limitation, not to the heir of that person strictly according to the legal definition of an heir, but to his then living heir apparent, or heir presumptive. If the limitation had been to the heir, strictly so called, of the living person, such limitation would have created a contingent remainder, upon the principle of the maxim, *Nemo est heres viventis.* But in the cases under consideration, the word has been held to indicate a *persona designata* then in being; which person is accordingly capable of taking a vested estate.

In the case of *Burchett* v. *Durdant*, 2 Vent. 311, Carth. 154, *sub nom. James* v. *Richardson*, 2 Lev. 232, the limitation of a remainder "to the heirs male of the body of B. *now living*," was held to give a vested remainder to the then heir apparent of B. The words in italics obviously supply the grounds of this decision.

In the case of *Darbison* v. *Beaumont*, 1 P. Wms. 229, there was a limitation in a will, not immediately preceded by a vested estate of freehold, to the heirs male of the body of the testator's aunt, who was living, and had three sons all living, at the date both of the will and of the testator's death; and the testator gave a pecuniary legacy to his said aunt, and to each of her sons, thereby taking notice of the fact that they were all living. This remainder, if construed as a contingent remainder, to the heirs male in the strict sense of the words, being preceded by no vested estate of freehold, would have been void in its inception; and

even if not void in its inception, it would have been void in the events which happened. But the Court of Exchequer held that, under the circumstances, the words must be construed to give a vested estate in tail male to the eldest son of the testator's aunt. This judgment, having been reversed in the Exchequer Chamber, was afterwards restored and affirmed in the House of Lords. (3 Bro. P. C. 60.)

Remarks upon *Darbison* v. *Beaumont* and *Goodright* v. *White*.

It is material to observe, that in the last cited case the limitation, if construed as a contingent remainder, would have been void *in its inception*, and not only in the events which happened; which is a sufficient reason for holding that it was an executory devise; nor does there seem to be any obstacle in the way of its validity as an executory devise. The result seems to be, that the question really at issue was not whether the limitation should be construed as a contingent or as a vested remainder, but whether the limitation should enure to the benefit of a *persona designata*, or whether it should wait for the death of the aunt to ascertain the person entitled to the benefit of it. This circumstance does not seem to have been sufficiently considered. It has a very important bearing upon the inference to be drawn from the case. If the validity of the limitation had depended upon its being construed as a vested remainder, this might have afforded a strong argument in favour of such construction. But since the limitation seems to be good *quâcunque viâ*, as an executory devise if not as a vested remainder, this argument in favour of the construction adopted seems not to have existed.

The same remark seems also to apply to the case of *Goodright* v. *White*, 2 W. Bl. 1010, which is cited in this connection by Fearne. (Fearne, Cont. Rem. 212.) In that case the limitation which was construed as a vested remainder in the heir apparent of the testator's daughter during her lifetime, would have been void in its inception if construed as a contingent remainder, and was therefore capable of being construed as an executory devise.

Fearne appears to have adverted to the distinction above taken, in the following words:—"We may observe, however, that there was not one of the last noticed cases, in which the

ancestor took the legal estate of freehold. Those cases only operated by way of exception to the rule, *nemo est hæres viventis;* and consequently made that a vested limitation, which otherwise would, according to that maxim, have been contingent." (Fearne, Cont. Rem. 212.) It may certainly be doubted, whether the point attracted as much attention as it perhaps deserved. The language of the judges strongly suggests the conclusion, that they thought themselves obliged to choose between holding the limitation to be vested, and holding it to be void.

Fearne's suggestion as to the rule in *Shelley's Case.*

Fearne also treats all limitations to heirs, or heirs of the body, coming within the rule in *Shelley's Case*, as being exceptions from the fourth class of contingent remainders. That rule embraces all limitations, included in the same instrument, of an estate of freehold to an ancestor, followed by a subsequent limitation to his heirs, whether general or special. It is the settled rule of law that, under these circumstances, the heirs, except under special circumstances, take no estate at all, but the limitation apparently made to them coalesces with the freehold previously taken by the ancestor, in such a way as to give him the inheritance; such inheritance being an estate tail, or a fee simple, accordingly as the limitation to the heirs is in tail or in fee simple. In such limitations, as the phrase goes, the word *heirs* is used only as a *word of limitation*, not as a *word of purchase.*

Since the heirs do not, under these limitations, take any estate at all, it seems to be not very appropriate to treat the limitations to them as being exceptions from a class of contingent remainders. The last words seem more properly to denote a species of remainders which, seeming to be contingent, are in fact vested. It therefore seems to be the more appropriate course, to indicate the bearing of the rule in *Shelley's Case* upon the forms of limitation appropriate to the fourth class of contingent remainders, and to reserve that subject, which is sufficiently complex, for a separate statement.

Further Remarks on the Liability to Destruction.

Division of the subject.

The causes, or methods, of the destruction of contingent remainders at common law, may conveniently be divided into the following heads:—

1. Forfeiture;
2. Surrender;
3. Merger;
4. Tortious alienation;
5. Turning to a right of action; and
6. Natural expiration of the precedent estate.

Of these, the first five have been, either directly or indirectly, wholly abolished by statute; but a knowledge of them is required in order to understand questions which may arise during the examination of old titles. The sixth division is still a matter of practical importance.

1. Forfeiture.

By the common law, a tenant for life incurred a forfeiture of his estate by making any alienation which devested the remainders and reversion thereupon, or by doing anything in any matter of record which amounted to the assertion of a right in himself to the inheritance, or to an admission of a like right in a stranger. The various methods by which a forfeiture might be thus incurred are enumerated and explained in Lord Coke's comment on Litt. sect. 416. Such a forfeiture generally gave an immediate right of entry to the next remainderman having a vested estate. If such a forfeiture had been incurred by the tenant of the precedent estate, an entry made by the next vested remainderman would at common law have destroyed all intermediate contingent remainders. (Fearne, Cont. Rem. 323.) But since an estate of freehold cannot be defeated without an entry made by the person entitled to take advantage of the forfeiture, the forfeited estate would, until entry, continue to subsist and to support the subsequent contingent remainders.

2. Surrender.

If the tenant of the precedent estate had surrendered his estate to the next vested remainderman, such remainderman

having an estate of at least as great in *quantum* as the surrendered estate, the precedent estate would have been destroyed by the surrender, and all intervening contingent remainders would at common law have been destroyed with it. (Fearne, Cont. Rem. 318; and Butl. note *f*, at p. 321.) Unless the subsequent estate was an estate of inheritance, little would be gained by the destruction of the intervening contingent remainders. But if the subsequent estate was of inheritance, the destruction of the intervening contingent estates would liberate the inheritance from all liability to be postponed to them, in case they should ever become vested; and thus the tenant for life and next vested remainderman could, by collusion, absolutely dispose of the inheritance pending the contingency. These are probably the cases referred to by the word *surrender* in the statute 8 & 9 Vict. c. 106, s. 8, hereinafter cited. The cases there referred to by the word *merger* are probably those discussed in the next following paragraph. Upon the distinction between surrender and merger, see p. 67, *supra*.

3. Merger.

If either by conveyance, or by descent, the next vested estate of inheritance came to the tenant of the precedent estate, the precedent estate was destroyed by merger, and all intervening contingent remainders were destroyed. (Fearne, Cont. Rem. 317; *ibid.* 343—345.) But this is subject to the observations contained in the next following paragraph.

In what cases merger effected no destruction.

The inheritance cannot, properly speaking, be *conveyed* to the tenant of the precedent estate, as such, unless the precedent estate is already in being as a separate estate; so that in all cases in which merger takes place by the conveyance of the inheritance to the tenant of the precedent estate, such merger is necessarily subsequent to the creation of the precedent estate. But it is possible, either by descent, or by the operation of the rule in *Shelley's Case*, for the precedent estate and the next vested estate of inheritance to meet in the same person simultaneously with the creation of the precedent estate. If a testator seised in fee simple should devise lands to his eldest son for life, with remainder in tail male to the successive sons of the eldest son, and the will should contain no further limitations; then the

estate for life and the next vested estate of inheritance (the reversion in fee simple upon the limitations contained in the will) would simultaneously be vested in the eldest son, the former by the will and the latter by descent. And if a settlor should in a settlement insert limitations similar to those above supposed, and should further insert a limitation in fee simple to the eldest son's right heirs, the eldest son would, by the operation of the rule in *Shelley's Case*, simultaneously take an estate for life and the next vested estate of inheritance. And if the limitations in tail to the successive sons should, at the testator's death, or at the execution of the conveyance, be contingent,—either by reason of there being no such son yet *in esse*, or by reason of the limitations to them being postponed until they should attain the age of twenty-one years, they being *in esse* but below that age, —all such contingent remainders, if the law of merger were suffered to apply strictly, would have been destroyed at the moment at which the settlement first came into operation; thus to a great extent making the settlement nugatory in its inception. In order to prevent this hardship, a modification was introduced into the law of merger. In any such case, when a merger takes place *eo instanti* with the creation of the precedent estate, it is not for all purposes an absolute merger; and it did not, even at common law, destroy any intermediate contingent remainders limited by the same instrument; but the estates united by the merger remained, as the phrase goes, *liable to open and let in the contingent remainders*, provided that they became vested during what would have been the subsistence of the precedent estate if it had not been merged. (Fearne, Cont. Rem. 36, V. 6; *ibid.* 341—345; 3 Prest. Conv. 161; *ibid.* 374 *et seq.*; *Lewis Bowles's Case*, 11 Rep. 79; Harg. n. 8 on Co. Litt. 28a.)

Destruction through forfeiture, surrender, or merger now prevented by statute.

The 8 & 9 Vict. c. 106, s. 8, enacts, that a contingent remainder existing at any time after 31st December, 1844, shall be, and, if created before the passing of the Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

This enactment was in substitution for 7 & 8 Vict. c. 76, s. 8; which was repealed, as from its commencement, by 8 & 9 Vict. c. 106, s. 1.

4. Tortious alienation of precedent estate.

Certain assurances, namely, a feoffment, a fine, and a recovery, were capable at common law of what is called a tortious operation; that is to say, they could convey to the feoffee, conusee, or recoveror, a greater estate than was rightfully possessed by the feoffor, conusor, or recoveree. The estate so conveyed was not, either wholly or in part, the estate of the person making the assurance, but a totally new estate, and the old estate of the person making the assurance* was absolutely destroyed. If the precedent estate upon which any contingent remainder depended was destroyed by this means, the contingent remainder was destroyed likewise. (*Archer's Case*, 1 Rep. 66; and cases cited in margin, Fearne, Cont. Rem. 317.)

Is now no longer possible.

The tortious operation of feoffments made after 1st October, 1845, is prevented by 8 & 9 Vict. c. 106, s. 4; and fines and recoveries were abolished by the Fines and Recoveries Act, s. 2. Thus this cause of the destruction of contingent remainders has been indirectly removed by statute.

5. Turning of precedent estate to a mere right.

The methods hitherto considered, by which contingent remainders may be destroyed, depend upon the destruction of the precedent estate, in such a sense that, after its destruction, it no longer has any existence, even as a right of action requiring a real action for its recovery. But a contingent remainder might equally be destroyed if the precedent estate, instead of ceasing absolutely to exist, was merely devested, in such a sense as to be turned to a right of action.

Thus, if the precedent estate had first been turned to a right of entry by the disseisin of the tenant, and this right of entry had been subsequently tolled, or turned to a right of action, by a descent cast on the part of the disseisor, then, if the latter

* But not the estate of the person entitled, upon the expiration of his estate, as the remainderman upon an estate for life, or becoming entitled as issue in tail upon his death.

event took place pending the contingency, any contingent remainders which depended for their existence upon the precedent estate, would have been destroyed. This is commonly expressed by saying, that a right of action is not sufficient to support a contingent remainder. (Fearne, Cont. Rem. 286.) The subject contains some rather intricate learning, upon which, in the present state of the law, it is not necessary to enlarge.

6. Natural expiration of precedent estate pending the contingency.

For the purpose of taking by descent, a child *en ventre sa mère* has always been regarded as standing in the position of a child *in esse;* and it seems that in devises of lands under a special custom, before the Statutes of Wills, a devise of an immediate freehold to an infant *en ventre sa mère* was good. (3 Swanst. at p. 617.) But, by devises made under the Statutes of Wills, it is doubtful whether the infant could take, except by way of remainder; and it is the better opinion that a child *en ventre sa mère* could not, at common law, have taken by virtue of a contingent remainder, if the precedent estate of freehold had expired before his birth. The law was so laid down by the Courts of King's Bench and Common Pleas, in the case of *Reeve* v. *Long*, 1 Salk. 227, 3 Lev. 408, 4 Mod. 282; and though this judgment was afterwards reversed by the House of Lords, that decision, which was contrary to the unanimous opinion of the judges, was regarded with so much dissatisfaction, that the statute mentioned in the next following paragraph was not long afterwards passed in order to remove all doubt.

The principle extends at common law to a child *en ventre sa mère.*

Statute in relief of posthumous children.

The statute commonly cited as 10 & 11 Will. 3, c. 16, but in the Statutes Revised, vol. 2, p. 85, given as 10 Will. 3, c. 20, enacts, in effect, that where any estate then already was or should thereafter, by any marriage or other settlement, be limited in remainder, either in favour of the first or other son or sons of the body of any person lawfully begotten, or in favour of a daughter or daughters lawfully begotten, with any remainder over, then any child lawfully begotten, but posthumously born, should, by virtue of such settlement, take such estate in the same manner as if such child had been born in the father's lifetime.

In *Reeve* v. *Long*, the limitations occurred in a will, and this fact may have been relied upon by the House of Lords as affording ground for a distinction. It is said that the language of the above-cited statute, which seems to point towards settlements effected by deed, was due to their reluctance to admit into it anything which might seem to throw doubt upon their decision in *Reeve* v. *Long*.

7 & 8 Vict. c. 76, s. 8.

An abortive attempt to remedy the hardship frequently wrought by the destruction of contingent remainders through the natural expiration of the precedent estate pending the contingency, was made by the statute 7 & 8 Vict. c. 76, s. 8. This section was repealed, as from its commencement and taking effect, by 8 & 9 Vict. c. 106, s. 1.

Statutory protection of certain contingent remainders.

The statute 40 & 41 Vict. c. 33, enacts, that every contingent remainder created by any instrument executed after 2nd August, 1877, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use, or executory devise, or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise, or other executory limitation.

This Act is generally believed to have been passed in consequence of the observations made by the judges in the case of *Cunliffe* v. *Brancker*, 3 Ch. D. 393.

What contingent remainders are still liable to destruction

It will be seen that the common law doctrine of the destruction of contingent remainders by the natural expiration of the precedent estate pending the contingency, is by no means obsolete; since it still applies (1) to all contingent remainders created by any deed executed on or before 2nd August, 1877, or by any will executed before that date and not subsequently revived or republished; and (2) to all contingent remainders,

whenever created, which do not conform to the rules regulating the creation of executory interests.

Immunity from destruction implies subjection to rule against perpetuities.

Legal contingent remainders which are protected from destruction by 40 & 41 Vict. c. 33, must therefore conform to the rule against perpetuities. And this doctrine applies also to contingent remainders which are protected from destruction by reason that the legal estate is outstanding in trustees or mortgagees. (*Abbiss* v. *Burney*, 17 Ch. D. 211.) As to the immunity from destruction of the last-mentioned contingent remainders, see p. 95, *supra*.

Trustees to preserve Contingent Remainders.

Their origin and nature.

The liability of contingent remainders to be destroyed by the premature determination of the precedent estate,—that is, by its determination otherwise than by natural expiration,—led to the invention of *trustees to preserve contingent remainders*. An estate was interposed between the precedent estate and the contingent remainders, intended to take effect in case the precedent estate should be determined by any means in the lifetime of the tenant thereof, and in such case to subsist in possession during the continuance of the residue of his life. These limitations were introduced into practice in the seventeenth century. The common form of them, as stated by Butler (Fearne, Cont. Rem. 6, note *d*) is to the following effect:—

> After the determination of the precedent estate, by forfeiture or otherwise, in the lifetime of the tenant, To the use of the trustees and their heirs during the life of such tenant, in trust for him and to preserve the contingent remainders.

The precedent estate contemplated by these limitations was always an estate for life; because, though it might by possibility be an estate tail, in such a case no precautions could have prevented the destruction of any subsequent estates, whether contingent or vested, at the will of the tenant in tail in possession. It was not necessary that the limitation should expressly refer

to the possibility of the destruction of the estate of the tenant for life, by forfeiture or otherwise, in his lifetime; and if the limitation was merely in the form of a remainder to the trustees and their heirs *during the life of the precedent tenant*, the possibility that such a premature determination might occur was sufficient, without express reference to it. This was, in fact, the actual form of the limitation in the great case of *Dormer* v. *Parkhurst*, hereinafter cited. In that case, moreover, the precedent estate was not an estate for life, but a term of years determinable upon the dropping of a life: a further development of the device for preserving contingent remainders, upon which some remarks will be made shortly.

It has even been suggested by an eminent conveyancer, that the insertion of the words "in his lifetime" is improper, and that, instead of aiding the intention of the limitation, they rather raise a doubt whether it gives rise to a vested estate. (Sweet, 9 Jarm. Byth. 156, note *h*.) The limitation there referred to is a limitation to the dower trustee in the uses to bar dower, which was identical in its general design with the limitation to trustees to preserve contingent remainders. The reasons given are ingenious; and the proposed form gives great force to the argument to show that the estate, at all events if limited in that form, is a vested estate. But the suggested form was not then, as Mr. Sweet admits, commonly used in practice; and the suggestion does not appear to have been generally adopted. The following form is given in Davidson, 4 Prec. Conv. 2nd ed. 333, as being suitable for insertion in a will, in any case in which, notwithstanding the provisions of 8 & 9 Vict. c. 106, s. 8, the conveyancer might wish to insert such a limitation:—

> From and after the determination of that estate by any means in his lifetime, To the use of [*trustees*] and their heirs during the life of the tenant for life whose estate shall so determine, In trust for him and by the usual ways and means to preserve the contingent remainders expectant or dependent thereon.

Upon the construction of such limitations, when the restriction, "during the life of the tenant for life," was omitted, so

that the limitation was to the trustees and their heirs simply, thus assuming the form of a limitation in fee simple instead of a limitation *pur autre vie*, see *Lewis* v. *Rees*, 3 Kay & J. 132, and the cases there cited. Such an omission of course could occur only through carelessness, not by design.

Limitations to the trustees and their heirs simply.

Under such a limitation as the foregoing, the trustees would evidently take an estate *pur autre vie;* and the question, whether such estate is vested or contingent, is the only question that could arise. Then, if it be granted that this estate is a vested estate, it will be seen that the tenant of the precedent estate could not, by the methods above enumerated, destroy the contingent remainders (because they were not the immediate remainders upon his own estate) without the concurrence of the trustees; and the courts of equity treated such concurrence on the part of the trustees as being generally a breach of trust. (Fearne, Cont. Rem. 326—328.) By consequence, trustees so concurring were personally liable for any damage which might accrue from the breach; and any person taking the lands, either as a volunteer, or as a purchaser for value with notice of the breach, was himself bound by the trust. (See *Mansell* v. *Mansell*, 2 P. Wms. 678, at p. 681.) But under special circumstances, the court would permit, or even order, the trustees to concur in destroying contingent remainders. (*Bassett* v. *Clapham*, 1 P. Wms. 6th ed. 358, and cases there cited in notes.)

How these limitations preserved the remainders.

The question whether the trustees took a vested estate, was obviously, before 8 & 9 Vict. c. 106, a question of the utmost practical importance; because, if they had taken a contingent estate, their estate would have been nothing but one more contingent remainder, which would have been equally liable to destruction with all the rest. This question has led to some difference of opinion. But it was for all practical purposes set at rest for ever by the decision of the House of Lords in the case of *Smith* d. *Dormer* v. *Packhurst* or *Parkhurst*, commonly cited as *Dormer* v. *Parkhurst*, or *Dormer* v. *Fortescue*, 3 Atk. 135, 6 Bro. P. C. 351, Willes, 327, 18 Vin. Abr. 413, pl. 8, in which case the estate was decided to be a vested remainder. Fearne

The estate of the trustees was a vested estate.

approved of this decision; Butler expresses no dissatisfaction with it; but Mr. Josiah Smith plainly intimates his opinion, that it was directly opposed to the principles of the law, and that it can be justified only by the pressing necessity not to overturn all the settlements then in existence. (Smith on Executory Interests, p. 116 *et seq.*)

Review of the controversy.

It is conceived that, in this controversy, each side is partly in the right and partly in the wrong. The truth seems to be, that the definition of the first class of contingent remainders, as given by Fearne, is somewhat incomplete; and that, by reason of this incompleteness, it contains within its terms the estate of trustees to preserve contingent remainders; and that in this sense, and to this extent, those who have contended that the estate in question is a contingent remainder, are right; but that the definition admits of being rectified so as to exclude this estate, without at the same time excluding any other estate which it was designed to include; and that, when examined by the proper tests for distinguishing vested estates in general from contingent estates in general, the estate of the trustees seems much more properly to come within the conception of a vested estate than of a contingent estate. This is equivalent to saying that the decision in *Dormer* v. *Parkhurst* seems to be substantially right in principle.

In the definition given of the first class of contingent remainders (at p. 98, *supra*) the words between inverted commas are taken literally from Fearne, and the explanatory clause which follows them is adapted from the words of Butler, in a note upon the passage. The estate of the trustees does seem to come within the words both of Fearne and of Butler, if they are taken strictly. It is the fact that in this case "the remainder depends entirely upon a contingent determination of the preceding estate itself"; and that, while the precedent estate is capable of being determined in several ways, the estate of the trustees is so limited as to take effect only in case the determination shall take place in some of those ways. But the examples given by Fearne show his meaning. In those examples the contingent remainder is capable of being *destroyed*, if the precedent estate should determine in what may be called the wrong way; and

this quality of contingent remainders supplied the principal motive which induced him to write his treatise. This distinguishing characteristic is not possessed by the estate of the trustees, because, if the precedent estate should determine in the wrong way, that is, by the death of the tenant for life, the estate of the trustees will not be *destroyed*, but will simultaneously determine by *its own natural expiration*. Nothing is more evident than that Fearne's treatise was not written to illustrate the nature of estates of this description; and if by inadvertence he has included any of them in his definition, the most reasonable course seems to be, to amend the definition so as to exclude these extraneous specimens, and not to take advantage of the words of the definition in order to include within it something to which it was not meant to apply.

The estate of the trustees is such that it either must actually take effect in possession or else must determine by natural expiration *eo instanti* with the determination of the precedent estate. But no words could be more appropriate to describe a vested estate. Every vested estate which is capable of a natural expiration, may by possibility fail to become an estate in possession, by reason of its determination during the continuance of, or *eo instanti* with, the precedent estate. The peculiar feature of contingent remainders, and the only feature which makes it necessary to bestow upon them special consideration, is their liability to fail to become estates in possession by reason of something else than their own natural expiration.

Proposed modification of Fearne's definition.

It accordingly seems to be expedient that the following proviso should be added to the definition above given (p. 98) of the first class of contingent remainders:—*Provided always, that the precedent estate be capable of determination in at least one way, which will neither vest the remainder nor cause it to determine by its own natural expiration.*

Cases in which the first estate was a term of years.

When the idea of limiting an estate of this kind to trustees to preserve contingent remainders had become an established device of conveyancers, a further development, or modification, of the same idea was introduced. In lieu of an estate for life to the person who was intended to take the first beneficial estate,

a term of years was limited to him determinable upon the dropping of his own life, followed by an estate to the trustees in the usual form to preserve contingent remainders. This was the form of the limitations of the settlement in the above-cited case of *Dormer* v. *Parkhurst*. In such cases the estate of the trustees, being *pur autre vie*, was of freehold; and since it was a vested estate, the actual seisin, during the continuance of the term of years, was in the trustees. The object of the limitation to the trustees was not, strictly speaking, to prevent the tenant of the precedent estate from destroying the contingent remainders, which he could not effectually have done, since he had only a term of years; but its object was, having first deprived the tenant of the precedent estate of all power of destruction, to provide a sufficient estate of freehold to support the contingent remainders. In other words, the supporting estate having been taken away from the tenant for life, by turning him into a tenant for years, it became necessary to vest the supporting estate in somebody else; which was effected by vesting it in the trustees. The only method by which the tenant of a precedent estate for years could have attempted to affect the contingent remainders, was by making a tortious feoffment; but by this means he would have gained nothing, for the right of entry of the trustees would have preserved the contingent remainders until the trustees could revest their freehold by making an actual entry upon the feoffee; so that the tenant of the precedent estate would have incurred a forfeiture to no purpose.

It was suggested in the 2nd edition of Davidson's Precedents in Conveyancing (vol. 3, p. 208, and see also vol. 2, p. 331, note *d*) that the word *forfeiture* in 8 & 9 Vict. c. 106, s. 8, is not well adapted to include the case of a forfeiture incurred by any act or default of the tenant for life which, instead of taking place by mere operation of law, is effected by an express proviso for cesser contained in the settlement; as, for example, under an ordinary "name and arms clause"; and that in such cases a limitation to trustees to preserve contingent remainders might prudently be inserted in the settlement, notwithstanding the provisions of the last-cited enactment. But no remainder,

properly so called, can take effect upon the determination of a precedent estate by a forfeiture in this sense of the word. (*Vide supra*, p. 62.) It would therefore seem that the forfeitures above referred to were such that the subsequent limitations need no trustees to preserve contingent remainders, either by reason of the statute, or else by reason of the intrinsic nature of the subsequent limitations themselves. The subsequent estates, if valid, could take effect only as executory interests, which did not require trustees to preserve them from destruction. In the 3rd edition of the same work (vol. 3, p. 322) it is said that the practice of omitting such limitations had then (1873) become well established; though it was mentioned that writers of authority recommended adherence to the old practice, with a view to the interference of the trustees for checking waste on the part of the tenant for life, if necessary, or to the convenience of their being entrusted with the protectorship of the settlement in the event of the extinguishment of the life estate. (See Lewin on Trusts, ch. viii. s. 1, § 18; ch. xvi. § 12.)

The trustees above described are very much in the nature of a device of conveyancers, designed to intercept the operation of a rule of law, and not intended, under ordinary circumstances, to exercise any active function. They bear in this respect a very close resemblance to the dower trustees in the old-fashioned limitations of uses to bar dower. These were designed, by the interposition of an estate which, by the rule recognized in *Dormer* v. *Parkhurst*, was a vested estate of freehold, but which generally conferred no positive privilege or active duty, to prevent the merger of an estate for life in the subsequently limited inheritance. It is probable that trustees to preserve contingent remainders such as those above described, are the only trustees referred to under the phrase "bare trustee" in the Fines and Recoveries Act, ss. 27, 31. But under certain circumstances trustees to preserve contingent remainders were needed in a settlement, who differ in function and require to be distinguished from the bare trustees above described. When contingent remainders were limited to the sons, or other issue, of a living person, who did not himself take a prior life estate, it was necessary to limit a prior estate to trustees, during the life

Another kind of trustees to preserve contingent remainders.

of such person, to preserve contingent remainders, lest the remainders in favour of issue born subsequently to the determination of all the prior estates should be defeated. The difference in function between these trustees and the previously described bare trustees is obvious: their function was to guard against a destruction of the contingent remainders, by reason of the *natural expiration* of the precedent estate pending the contingency. The present writer has met with an example of the insertion of trustees of the lastly described kind, in a will, dated in 1880, by which very extensive and valuable estates were settled. It would therefore appear that some conveyancers are unwilling to rely, for this purpose, upon the provisions of 40 & 41 Vict. c. 33.

Resemblance to the estate of dower trustees.

The object of the insertion of a limitation to the dower trustee, in the uses to bar dower, according to the common practice before the Dower Act, 3 & 4 Will. 4, c. 105, is to effect the formal interposition of a vested estate between a life estate and a remainder of inheritance; though in this case the remainder was always a vested fee simple, not a contingent remainder. This limitation therefore bears, in its general design, a close resemblance to the limitation to trustees to preserve contingent remainders; and the form of limitation in common use was identical with the form used to create trustees to preserve contingent remainders.

Whether such limitations are now valid.

There are some grounds for doubting whether, subsequently to the coming into operation of 8 & 9 Vict. c. 106, the limitations now under discussion have any longer had any meaning, and whether they are not therefore now void for absurdity, if they follow upon an estate of freehold. So far as the preservation of contingent remainders is concerned, this question is of no practical importance. So far as dower trustees are concerned, it will remain a question of practical importance as long as any husbands are in existence, whose wives are still living, and who were married on or before 1st January, 1834, the date of the coming into operation of the Dower Act, 3 & 4 Will. 4, c. 105. To such husbands it is still necessary to make the conveyance of a legal estate in fee simple under the form of a conveyance

to uses to bar dower, in order to prevent the wife's dower from attaching. At the present day (1884) such a person could hardly be below seventy years of age; and the class must, therefore, be now a small one, and rapidly tending towards extinction.

The reasons for doubting the validity of the limitation are as follows:—Forfeiture can no longer be incurred, either by making a tortious feoffment, since 8 & 9 Vict. c. 106, s. 4, by which the tortious operation of feoffments made after 1st October, 1845, is prevented; or by levying a fine, or suffering a common recovery, now that those assurances have been abolished by the Fines and Recoveries Act, s. 2; or by *joining the mise on the mere right*, or otherwise compromising the title of the remainderman in a real action, now that the only real actions in which those offences could practically be committed have been abolished by 3 & 4 Will. 4, c. 27, s. 36. Whether a forfeiture by operation of law, as distinguished from the operation of an express condition of forfeiture contained in the settlement, can now be incurred by a tenant for life in any way whatever, is now, to say the least, exceedingly doubtful. With respect to surrender and merger, the aspect of the question is curious. Taking merger to refer to cases in which the next vested remainder of inheritance is conveyed to the tenant for life, any such conveyance would, of course, be impossible upon the hypothesis that the estate of the trustees is an actually existing estate; because, if the estate exists, it is undoubtedly a vested estate; and this, being interposed between the estate for life and the remainder, would make all such merger as that above supposed impossible, so that the hypothesis which would make the estate of the trustees a vested estate, also deprives the law of merger of all meaning in relation to the question, and therefore (so far) destroys the reasons for supposing that the estate is in fact a vested estate. Similarly, with regard to surrender, the interposition of the estate of the trustees, if it exists, would prevent a surrender to any remainderman whose interest is subsequent to the contingent remainders. And a surrender cannot be made by a tenant for his own life to a tenant *pur autre vie*, so that no surrender to the trustees themselves is possible. (Shep. T. 305; 3 Prest. Conv. 225.)

These objections are discussed with some minuteness in an acute and learned note contained in the third edition of Davidson's Precedents, vol. 3, p. 323, note (*n*), in which the opinion is expressed, that such limitations are still valid; but it is suggested that there can, at all events, be no question as to their validity, when they follow upon a term of years determinable with the life of the tenant for life, instead of following upon an estate of freehold for his life. It does not appear to have been thought necessary to adopt this suggestion in practice.

CHAPTER XIII.

THE RULE IN SHELLEY'S CASE.

THE title at the head of this chapter commonly refers to the statement of the circumstances under which verbally distinct limitations contained in the same instrument, one limitation being to a given person, and the other being to his heirs, either general or special, will not give any distinct estate to the heir, but will give an estate of inheritance to the ancestor.

The statement of the cases under which such limitations to the heirs take effect, not in the heirs themselves, but in the ancestor whose heirs they are, is commonly styled the Rule in Shelley's Case, from the reported case of that name. (1 Rep. 93; Serj. Moore's Rep. 136; 1 Anders. 69; Dy. 373 b, pl. 15; Jenk. cent. 6, c. 40.) It will be convenient, before discussing that case, to draw some general outline of the rule of law in question.

The word *heirs* is in these limitations a word of limitation not a word of purchase.

In the limitations now under consideration, there occurs always an estate of freehold limited to a specified person, and a subsequent limitation, whether immediate or remote, expressed to be made to the heirs, or to some class of the heirs, of the same person. The prior estate and the subsequent limitation must both arise under or by virtue of the same instrument. Grammatically, the construction of the second limitation might be, to give a *remainder by purchase* to the specified heirs. And since the person whose heirs they are, or rather, are to be, is living at the date of the limitation, such a remainder, if taken by the heirs as purchasers, would be a contingent remainder of Fearne's fourth class, being a limitation in remainder to a person not yet ascertained or not yet in being. (*Vide supra*, p. 103.) But the law puts upon the limitation to the heirs a different construction, not giving to them any estate at all by purchase, but taking account of the mention of the heirs only for the purpose of giving a corresponding estate to the specified ancestor. There-

fore, it is commonly said, that in limitations coming within the rule in Shelley's Case, the word *heirs* is not a word of purchase but a word of limitation.

We have therefore the following essential features in these limitations:—(1) a prior estate of freehold; (2) a subsequent limitation, contained in the same instrument, expressed to be to the heirs, whether general or special, of the same person. In all such cases the general rule is, that no estate is taken by the heirs; but an estate of inheritance, corresponding in *quantum* to the class of heirs specified, is taken by the specified ancestor. Thus, the mention of the heirs general will give him a fee simple, of the heirs of his body will give him an estate in tail general; the mention of the heirs male of his body will give him an estate in tail male; and the mention of the heirs female of his body will give him an estate in tail female.

The ancestor may take either one estate, or two estates.

If the subsequent limitation to the heirs follows immediately, without the interposition of any mesne estate, upon the prior freehold, the freehold is merged in the inheritance, and the specified person takes an estate of inheritance in possession. If any estate sufficient to prevent merger is interposed, or if, by reason of any other circumstance, merger is prevented from taking place, he takes two distinct estates, a freehold in possession and an inheritance in remainder.

The last preceding paragraph assumes that the prior limitation of the freehold is a limitation of a freehold in possession. If the prior freehold is itself a freehold in remainder, the merger of it in the inheritance will of course not give rise to an inheritance in possession, but to an inheritance in remainder, which occupies the place, in the order of limitation, which would have been occupied by the freehold if it had not been merged.

Shelley's Case stated and discussed.

As *Shelley's Case* is one of the most important in the books, and as its true bearing does not seem to be a matter of universal knowledge, some account of it may be not unacceptable to the reader. A consideration of the subjoined pedigree will materially contribute to a right understanding of the case. It

is stated by Lord Coke, that the case was in *ejectione firmæ;* and according to more modern usage it would be styled *Nicholas Wolfe* d. *Richard Shelley* v. *Henry Shelley.* *Shelley's Case.*

EDWARD SHELLEY m. JOAN.
Tenants in special tail general, with remainder to Edward Shelley in fee simple. The wife died in the husband's lifetime, thus leaving him sole tenant in tail.

HENRY SHELLEY.
Who died in his father's lifetime leaving a daughter, Mary, living, and a son, Henry, the younger, *en ventre sa mère.*

RICHARD SHELLEY.
Under whom the plaintiff claimed by demise.

MARY SHELLEY.

HENRY SHELLEY,
The defendant.

Edward Shelley and his wife Joan were tenants in special tail general, that is, to them and the heirs of their two bodies begotten, with remainder to Edward Shelley in fee simple, of the manor of Barhamville, in the county of Sussex, of which the lands in question were parcel. The wife died in the husband's lifetime, thus leaving him sole tenant in tail. Henry Shelley, the elder, afterwards died in his father's lifetime, leaving a daughter, Mary Shelley, living, and leaving his wife *enceinte* of a posthumous child, afterwards Henry Shelley, the younger, the defendant in the case. Before the birth of the posthumous child, Edward Shelley, being sole tenant in tail, suffered a common recovery of the said manor, pursuant to a covenant in that behalf, in which he had covenanted that the said recovery should be *to the use of himself for the term of his life* without impeachment of waste; and after his decease, to the use of certain persons for twenty-four years; and after the said twenty-four years ended, then to *the use of the heirs male of the body of himself lawfully begotten, and of the heirs male of the body of such heirs male lawfully begotten;* with remainder over.

This recovery was actually suffered, and judgment therein was given, and a writ of *habere facias seisinam* awarded for the purpose of executing the seisin according to the recovery, upon

Shelley's Case. the 9th October, the day on which Edward Shelley died; and these proceedings took place some hours subsequently to his death, which occurred between the hours of five and six in the morning. On the 19th October the writ was executed; and on the 4th December the posthumous child was born.

The first question which arises upon this statement of the facts is, obviously, the question, whether the recovery, having been executed as aforesaid after the death of the recoveree, was valid. It is convenient to state, at the outset, that this question was decided in the affirmative.

The distinction between the capacity of a posthumous child to take *by descent*, and (according to the better opinion, which had not then been questioned) his incapacity to take *by purchase* has been above referred to. (*Vide supra*, p. 111.) It would seem (as the present writer understands the case) that Richard Shelley, the uncle, conceiving that the limitation to the use of the heirs male of Edward Shelley was a limitation to the heir male by purchase in tail male, and that his posthumous nephew was disqualified to take by purchase, by reason that he was *en centre sa mère* at the time when the limitation became vested, assumed himself to be tenant in tail male of the manor. He accordingly entered, and made a lease of the lands in question, being parcel of the manor, to Nicholas Wolfe, upon whom Henry Shelley, the nephew, afterwards entered. Thereupon Nicholas Wolfe brought the present action of ejectment against Henry Shelley, the nephew; and at the assizes for the county of Sussex a special verdict was returned, upon which the matter of law was afterwards argued in the Court of King's Bench.

The case being very important, both from the nicety of the points of law involved in it and from the magnitude of the interests at stake, it attracted much attention and was argued at great length. Before the Court of King's Bench had arrived at any decision, Queen Elizabeth, with a view to prevent, if possible, the ruin of both parties through protracted litigation, directed the Lord Chancellor, Sir Thomas Bromley, to assemble all the judges in conference, that they might come to some resolution. Several meetings of the judges were accordingly held, and afterwards, in accordance with their almost unanimous

opinion, judgment was given in the Court of King's Bench in favour of the defendant, Henry Shelley, the posthumous child. *Shelley's Case.*

The points principally debated are stated by Lord Coke to have been four. Of these, the first question related to the validity of the recovery, which, as above-mentioned, was decided in the affirmative by the opinion of "the better and greater part of all the justices and barons." (1 Rep. 106 a.) The second question arose upon the fact that, at the time of the recovery suffered, there was in existence a lease for years of the manor. The question here was, whether, under such circumstances, a recovery is executed by the judgment of recovery, before execution thereof by the writ of *habere facias*. This question was unanimously answered in the negative. (1 Rep. 106 b.) It is not material to the present purpose. The third and fourth questions, in the words of Lord Coke, were as follows:—

3. If tenant in tail having issue two sons, and the elder dies in the lifetime of his father, his wife *privement enseint* with a son, and then tenant in tail suffers a common recovery to the use of himself for term of his life, and after his death to the use of A. and C. for twenty-four years, and after to the use of the heirs males of his body lawfully begotten, and of the heirs males of the body of such heirs males lawfully begotten, and presently after judgment an *habere facias seisinam* is awarded, and before the execution, that is to say, between five and six in the morning of the same day in which the recovery was suffered, tenant in tail dies, and after his death, and before the birth of the son of the elder son, the recovery is executed, by force whereof Richard, the uncle, enters, and after the son of the elder son is born, if his [the posthumous son's] entry upon the uncle be lawful or not. The third point.
4. If the uncle in this case may take as a purchaser, for as much as the elder son had a daughter which was heir general and right heir of Edward Shelley, at the time of the execution of the recovery. The fourth point.

It will be observed that the third question merely states the whole of the facts, and then asks which party was in the right.

Shelley's Case. If this can be regarded as the "statement of a point" in the case, such statements would present very little difficulty. And it is manifest, that every case can contain only one such point as this. The reader will notice, without surprise, that this point is styled "the great doubt of the case." (1 Rep. 94b.)

The fourth point discussed.

It will be convenient first to dispose of the fourth point, upon which no opinion was expressed by the judges. This point refers to a distinction laid down by Lord Coke, with respect to the interpretation of the word "heir"; firstly, as a word of limitation, and secondly, as a word of purchase. According to this rule, in limitations to special heirs, where they do not take by purchase, but only supply the measure of an estate tail to the ancestor, and therefore take, if at all, by descent, the special heir may inherit, although he is not the heir general. But in limitations to heirs as purchasers, no heir can take by purchase except the heir general; and therefore the special heir cannot take as purchaser, unless he also unites in himself the character of heir general. In the words of Lord Coke:—"When a man giveth lands to a man and the heires females of his body, and dyeth [referring, apparently, to the death of the last-mentioned person], having issue a son and a daughter, the daughter shall inherit. . . . *But in case of a purchase it is otherwise:* for if A. have issue a sonne and a daughter, and a lease for life be made, the remainder to the heires females of the bodie of A. A. dieth, the heir female can take nothing, *because she is not heire; for she must be both heire and heire female,* which she is not, because the brother is heire." (Co. Litt. 24b.) This distinction was a well recognised rule of law in Lord Coke's day; but it has been shaken by some more recent decisions. (See *Wills* v. *Palmer*, 2 W. Bl. 687, 5 Burr. 2615; *Goodtitle* v. *Burtenshaw*, Fearne, Cont. Rem. App. I.) In *Shelley's Case*, the heir general of Edward Shelley, at the time of his death, was Mary Shelley, the daughter of Richard Shelley's elder brother; so that, by the above-stated rule of law, Richard Shelley, though the heir male of Edward Shelley, was incapable of taking under a limitation to the heirs male as purchasers, since he did not also unite in himself the character of heir general. This contention would have been fatal to Richard Shelley's claim, who was constrained to claim by purchase; since, if the estate tail was

executed in Edward Shelley, so that Richard could claim only by descent, the subsequent birth of the posthumous son of his elder brother would have defeated his claim. *Shelley's Case.*

It is unnecessary further to consider this objection against the plaintiff's claim; because, in the view taken by the judges of the third point, there was no need to come to any decision upon the fourth. The Lord Chancellor, and all the judges but one, held that under the rule of law named after the present case, the estate tail was executed in Edward Shelley, and consequently that Richard could take, if at all, only by descent; and that the posthumously born nephew had the prior right.

An attentive consideration of the arguments and judgment seems to show, that the decision went upon, and clearly established, these two distinct propositions, in relation to the rule now under consideration:— Two relevant points decided in the case.

1. When the ancestor by any assurance takes an estate of freehold, and by the same assurance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, always in such cases *the heirs* are words of limitation, and not of purchase. (1 Rep. 104 a.)
2. The further addition of words of limitation to "the heirs," makes no difference: provided that the further limitation is to heirs of the same quality.

The plaintiff's counsel began by admitting that the recovery, after the death of the recoveree, could be executed as against the issue in tail; but they took the distinction, that when so executed, it operated only as from the time of the execution; whence they inferred, that no use, and therefore no estate, could have been executed in Edward Shelley; and that his heirs male must necessarily take, under the limitation to them, by purchase. This last point was afterwards decided against them; upon the ground that the execution, when perfected, related back to the time when the recovery was suffered. (1 Rep. 106 b.) They proceeded to argue that, *even though the recovery had been executed in the life of Edward Shelley*, Richard must nevertheless have taken by purchase; for that the rule now The argument for the plaintiff.

Shelley's Case. under consideration did not apply to the above-stated limitation. "For they said, that the manner of the limitation of the uses is to be observed in this case, which is, first to Edward Shelley for the term of his life, and after his death to the use of others for the term of twenty-four years, and after the twenty-four years ended, then to the use of the heirs males of the body of the said Edward Shelley lawfully begotten, and of the heirs males of the body of the said heirs males lawfully begotten; in which case they said, that *if the heirs males of the body of Edward Shelley should be words of limitation, then the subsequent words*, viz., of the heirs males of the body of the said heirs males lawfully begotten, *would be void:* for words of limitation cannot be added and joined to words of limitation, but to words of purchase." (1 Rep. 95 a, b.)

The argument for the defendant.

The defendant's counsel began by arguing that the recovery was altogether void, for that execution could not be sued against the issue in tail after the death of the recoveree. (1 Rep. 96 a.) It will be observed that the defendant, Henry Shelley the younger, being both heir general and heir male to Edward Shelley, had a double title; and was equally entitled to succeed, whether the court held the recovery to be void, or whether they held that an estate in tail male was vested by the recovery in Edward Shelley. This first point, as to the validity of the recovery, was decided against them, as above mentioned. We may omit the argument on the second point, which has no connection with the rule in Shelley's Case, and proceed at once to the part of the argument upon the third point, which bears immediately upon that rule, and especially upon the above-cited argument of the plaintiff's counsel. "And as to what hath been objected, that, forasmuch as the limitation was to the heirs males of the body of Edward Shelley, *and of the heirs males of the body of the heirs males lawfully begotten*, that the heirs males of the body of Edward Shelley should be purchasers, for otherwise the subsequent words would be void; the defendant's counsel answered, *That it is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases*

(*the heirs*) *are words of limitation of the estate, and not words of purchase.* And, if it should be admitted, that in regard of the said subsequent words, the right heirs males should have by purchase to them and the heirs males of their bodies, then a violence would be offered as well to the words as to the meaning of the party; for if the heir male of the body of Edward Shelley should take as purchaser, then all the other issue males of the body of Edward Shelley would be excluded to take anything by the limitation for by that means the plural number will be reduced to the singular number, that is to say, to one heir male of the body of Edward Shelley only." (1 Rep. 104 a, b.) *Shelley's Case.*

It is to be regretted that the third point, "the great doubt in the case," is stated in such wide terms; because the reader gathers few details from the summary information "That upon the third question the law was for the defendant, and therefore the defendant's entry upon the uncle was lawful." (1 Rep. 106 a.) This defect is partly supplied by the statement of reasons given in the King's Bench by the Lord Chief Justice, Sir Christopher Wray, at the request of the counsel on both sides. He gave the following reasons as being the chief grounds for holding, upon the third point, that the uncle could have no claim except in the nature of a descent:—"First, because the original act, viz., the recovery, out of which all the uses and estates had their essence, was had in the life of Edward Shelley, *to which the execution after had a retrospect.* Secondly, because the use and possession might have vested in Edward Shelley, if execution had been sued in his life. Thirdly, the recoverors by their entry, nor the sheriff by doing of execution, could not make whom they pleased inherit. Fourthly, because the uncle claimed the use by force of the recovery, and of the indentures, *by words of limitation and not of purchase.* These were, as the Chief Justice said, the principal reasons of their judgment." (1 Rep. 106 b.) The judgment. The rule is expressly laid down in the judgment.

The writer leaves to the judgment of his readers the question, whether the considerations above stated justify the conclusion above drawn touching the true bearing and import of *Shelley's*

Case. He has been thus particular in stating the grounds of this conclusion, in view of the following strange remark by Butler:—"It is generally called the rule in Shelley's case, reported 1 Co. 93, and by contemporary reporters. In that case, *it was not a subject for the determination of the court, or even a subject of discussion;* but it is expressed in the arguments in clear terms, as an acknowledged rule of law, and has thence received its appellation." (Butl. note on Fearne, Cont. Rem. 28.) If Butler's reputation were less securely established, this remark might almost suggest a suspicion, that the practice of talking about *Shelley's Case* without having read it, is not wholly confined to the present generation.*

The Statement of the Rule.

The following propositions will, under all ordinary circumstances, suffice to determine the question of the rule's application to a particular case. It is to be observed that a great part of the subtleties with which this subject is congested, arose out of ill-constructed limitations, which can be of no service to the conveyancer, unless as warnings what to avoid.

(1.) The prior estate must be of freehold. (Co. Litt. 319 b; *ibid.* 376 b; 1 Rep. 104 a; Fearne, Cont. Rem. 28; 1 Prest. Est. 266; *ibid.* 309.) Such freehold is not necessarily for the life of the ancestor, but may be determin-

* It is possible that Butler may have been misled by a momentary confusion between *Shelley's Case* and *Taltarum's Case;* and that what was in his mind was the fact, that *Taltarum's Case* is often cited as the authority upon which depends the validity of common recoveries, as assurances by tenant in tail, though it contains no decision to any such purpose.

When a man like Butler makes a slip, he is likely to find others to follow him. With the remark above cited from Butler, compare the following passage from a later author:—"Although termed the rule in Shelley's Case, the rule is of much greater antiquity than that case, where, it will be observed, *no question arose upon it for the decision of the Court; but it is only stated in the arguments,* but in such precise and clear terms, that it has derived its name from the case." (Tudor, Lead. Cas. on R. P. 3rd ed. 599.) Fearne and Preston both treat *Shelley's Case* as being an express decision in favour of the rule. (Fearne, Cont. Rem. 181, 182; 1 Prest. Est. 347.)

able in his lifetime; as an estate to a woman *durante viduitate.* (Fearne, Cont. Rem. 30, v. 1.)

(2.) The subsequent limitation may be either to the heirs general or special. (Fearne, Cont. Rem. 28; 1 Prest. Est. 263—266.)

(3.) Both estates must arise under the same instrument. (Fearne, Cont. Rem. 71, v. 13; 1 Prest. Est. 309.)

(4). An estate taken by the ancestor by way of resulting use, is, for this purpose, an estate arising under the same instrument. (Fearne, Cont. Rem. 41, v. 8; 1 Prest. Est. 309.) In such cases, the ancestor must himself be the settlor.

(5.) An estate limited under a subsequent exercise of a power contained in the instrument, is, for this purpose, an estate arising under the same instrument. (Fearne, Cont. Rem. 74, v. 14; *Venables* v. *Morris*, 7 T. R. 342, at p. 348.)

(6.) The interposition of one or more intermediate estates does not prevent the application of the rule. (1 Prest. Est. 266, 267.) But, as above mentioned, accordingly as such estates are, or are not, interposed, the inheritance executed in the ancestor is remote or immediate. (*Vide supra*, p. 124.)

(7.) The subsequent limitation may be contingent. (Fearne, Cont. Rem. 34, v. 2; 1 Prest. Est. 267; *ibid.* 318, 319.)

(8.) In a devise, the word *issue* has, for this purpose, the same effect as the word *heirs;* unless it appears to have been intended as a designation of particular individuals. (Smith on Executory Interests, p. 248, Chapter XIII.; where the learning on this point, which opens an obvious door to doubt and confusion, is ably collected.)

(9.) The further addition to the word *heirs* of words of limitation to their heirs, does not prevent the application of the rule, if the latter heirs are of the same description as the former heirs. (*Shelley's Case*, 1 Rep. 93; Fearne, Cont. Rem. 181, v. 26; 1 Prest. Est. 347.)

(10.) The rule applies to equitable as well as to legal limitations; but the prior and the subsequent limitation must both be of the same quality in this respect. (Fearne, Cont. Rem. 52, v. 9; *ibid.* 57, v. 10.)

Where the prior limitation is in form equitable, while the subsequent limitation is in form legal, the rule will apply, if all the limitations are made in fact equitable, by reason that the whole legal estate happens to be outstanding. (*Re White and Hindle's Contract*, 7 Ch. D. 201.)

(11.) The rule applies to limitations of copyholds, as well as to limitations of freeholds. (Fearne, Cont. Rem. 60, v. 11.)

(12.) The rule does not apply where the subsequent limitation is an executory limitation. (Fearne, Cont. Rem. 276; 1 Prest. Est. 323.) This includes cases in which the prior limitation is executory; because in such cases the subsequent limitation is necessarily also executory. (*Vide supra*, p. 97.)

In *Re White and Hindle's Contract*, 7 Ch. D. 201, at p. 203, Sir Richard Malins, V.-C., stated *obiter*, that he "should be slow to admit" this proposition, if the question should come before him. It is conceived that he is not very likely to be followed in this doubt. The coalescence of an estate which is executory with an estate which is executed, is a mixture impossible to be figured by a well-disciplined imagination. Moreover, the modern tendency of the courts does not seem to lean towards unnecessarily extending the scope of the rule.

Origin of the rule.

The question as to the origin, or true grounds, of the rule in Shelley's Case, has given rise to much speculation, into which it

is not desirable to enter at length. Considering that, at the time when the rule arose, tenure was the mainstay of our political constitution, and that the preservation of the fruits of tenure was notoriously a principal aim of the law, and that settlements giving an estate for life to the ancestor with a remainder to his heir, if they had been permitted to take effect by way of remainder, would have enabled a family to enjoy all the advantages of a descent, while evading the feudal burdens by which a descent was accompanied: the opinion seems to be more than plausible, that the true origin of the rule is to be found in the policy of feudalism. (See 1 Prest. Est. 295—309.)

CHAPTER XIV.

EXECUTORY LIMITATIONS.

Their origin. For a long time previously to the Statute of Uses, 27 Hen. 8, c. 10, while uses existed only in the shape of what are now known as trusts, the Court of Chancery had been accustomed to give effect to devises of the use of lands; whereby for many practical purposes, lands may be regarded as having been then deviseable, although the common law (except by the special custom of certain localities) permitted no devise of the legal estate. When by the operation of the Statute of Uses, uses had been converted into legal estates, this general privilege of devise was lost; and since the statute was expressly extended to uses in being at the time of its enactment, this deprivation had, in a certain sense, a retrospective operation. The power to practically devise lands, by means of the creation of uses, would subsequently have been recovered through that construction of the statute which afterwards gave rise to the modern system of trusts. But the loss of a privilege to which people had long been accustomed was felt to be so great a hardship, that the government found itself in a manner compelled, without waiting for this indirect remedy, which was probably not at all foreseen, to restore by express enactment, what it had, perhaps only by inadvertence, taken away. Within a few years after the passing of the Statute of Uses, the Statutes of Wills permitted the devise of all lands held in socage for a fee simple, and of two equal third parts of lands held by knight-service for a fee simple.* Thus, within a short space of time there were introduced into our legal system two separate methods, both unknown to the common law, by which legal estates in lands might be created and conveyed.

* It was probably due to a fear lest the language of 32 Hen. 8, c. 1, might be held to extend to lands in tail, that it was expressly restricted to lands in fee simple by 34 & 35 Hen. 8, c. 5. (As to these statutes, see p. 175, *infra*.)

The language of the Statutes of Wills is exceedingly wide, permitting devises to be made by the owner "at his free will and pleasure;" and there existed this reason for relaxing, in respect to devises, the severity of the common law rules relating to abeyance of the seisin, namely, that, in case the seisin was not completely disposed of by the devise, there was nothing in the theory of the law to compel the conclusion, that during any unappropriated interval the seisin must be in abeyance. A devise, upon becoming operative, necessarily followed upon the death of the testator; and therefore the seisin, during the unappropriated interval, might be suffered to descend upon his heir-at-law, who would have taken the whole estate in the absence of the devise. This view was ultimately adopted, though not without opposition, and of course not immediately upon the passing of the statutes. Some time was required before such important changes in the theory and practice of conveyancing could be first thought of, then thought out, then generally accepted as plausible, and lastly adopted into the common practice.

The remarks in the foregoing paragraph only suffice to explain the emancipation of executory devises from the common law rules relating to abeyance of the seisin; and this accounts for only a part of the distinction between common law limitations and executory limitations. The latter are untrammelled, not only by the rules relating to abeyance of the seisin, but also by the rule which makes it impossible at common law to limit a fee simple upon the determination, or in defeasance, of another fee simple. (*Vide supra*, p. 64.) The introduction of this second element is explained by the operation of the Statute of Uses. Before the statute, when uses existed only as trusts, the Court of Chancery, in prescribing rules for the limitation of uses, did not confine them within either of the above-mentioned restrictions, which were applied by the common law courts to the limitation of legal estates. The Court of Chancery did not insist upon the analogy of the law being followed, either (1) as regards the impossibility of limiting a future interest, to take effect after or in defeasance of a fee; or (2) as regards the necessity for guarding against abeyance of the freehold. Limitations of uses were allowed which, if they had been limitations of legal estates at the common law, would have violated either or

both of the above-mentioned rules. When the Statute of Uses converted uses generally into legal estates, the question arose, whether uses thus limited in contravention of the rules of the common law should be allowed to take effect as legal estates by virtue of the statute. The ultimate decision of the courts was, after some hesitation, in favour of their validity.

By this means executory limitations were introduced into the law. It is possible that, if executory devises had stood alone, they would never have acquired their freedom from the common law rule forbidding the creation of a fee upon a fee; and this quality of them seems to be satisfactorily explained only by analogy to executory limitations contained in a deed, and taking effect under the Statute of Uses. But some doubt is thrown upon this explanation, regarded in the light of a positive historical fact, by the circumstance that limitations of a fee upon a fee seem to have been permitted in executory devises, at least as soon as, or even earlier than, in executory limitations made by deed. In 1 Eq. Ca. Ab. 186, pl. 3, Lord Nottingham is said to have stated, that the case of *Hinde and Lyon*, 3 Leon. 64, which was decided in the nineteenth year of Elizabeth, was the first case in which an executory devise over upon the defeasance of a fee was held to be good. It may be doubted whether any earlier example of a similar executory limitation contained in a deed can be found in the books.

Whatever may be the historical connection, in these respects, between executory devises and executory limitations contained in a deed, it is certain that the most marked characteristic of both species is their freedom from both of the common law restrictions above mentioned; and that it has never been authoritatively suggested that in either respect, so far as regards dealings with the freehold and inheritance of lands, there is any difference between executory devises and executory limitations contained in a deed.

Distinction as regards chattels real.

But in respect to dealings with chattel interests, there is an important distinction between executory devises and other executory limitations. There may be an executory devise of a chattel real, or term of years, whereby the legal estate in the term may be given to one for life, with a quasi-remainder over to another

person, which, when it becomes executed in possession by the determination of the precedent life estate, will carry with it the legal estate for the residue of the term. (*Matthew Manning's Case*, 8 Rep. 94; *Lampet's Case*, 10 Rep. 46; Fearne, Cont. Rem. 401, iv.) Such a limitation of the legal estate in a term is not possible in a deed; because such limitations in a deed can be effected only by the medium of the Statute of Uses, and no use of a chattel interest *in esse*, as distinguished from a chattel interest to be carved *de novo* out of a freehold, can be executed into a legal estate by the statute. Such a use of a chattel interest *in esse*, if declared in a deed, not being executed by the statute, can take effect only as a use apart from the statute; that is to say, as a trust. Accordingly, settlements of chattel interests, when effected by deed, are necessarily effected by settling the trust of them.

Executory devises, or rather bequests, are even possible, within certain limits, of personal chattels, so long as these are not things *quæ ipso usu consumuntur*. But such bequests lie outside the scope of the present work.

General definition.

Hence we arrive at the following general definition:—An executory limitation is a limitation of a future estate in lands, or of a future interest in chattels, or chattels real, which would be invalid, if made in an assurance at the common law, but which, so far as regards the freehold and inheritance of lands, is valid either in a will or in a conveyance to uses, and, so far as regards chattels or chattels real, is valid in a will or testament.

No remainder can be executory.

In the definition above given, it is essential that the limitation, though valid in a will or conveyance to uses, shall not be such as would be valid in a conveyance at the common law. In construing all instruments under which executory interests may arise, whether testaments or conveyances to uses, it is the settled rule, that no limitation which is capable of taking effect at the common law shall be construed to take effect as an executory limitation. (*Vide supra*, p. 96.) In other words, since a remainder is the only future estate which can take effect at the common law, no estate shall be construed as an executory interest which is capable of being construed as a remainder.

Two classes.

Two classes of executory limitations may therefore be distinguished, corresponding to two respects in which they differ from remainders at the common law:—

1. Limitations of a fee upon a fee.

(1.) Devises and limitations of uses whereby a precedent fee, devised or limited by the same instrument, is followed by subsequent limitations. The subsequent limitations must be to arise upon the happening of a contingency.* They may either defeat the precedent fee upon the happening of the contingency; or, if the precedent fee is a determinable fee, and is so limited as to determine upon the happening of the same contingency, and this contingency is such that, if it happens at all, it must happen within the time prescribed by the rule against perpetuities, they may follow upon the regular determination of the fee.

2. Limitations of a freehold *in futuro*.

(2.) Devises and limitations of uses, not less in *quantum* than a freehold, which are limited to take effect either upon a contingency or after the expiration of a fixed period, and which are such that, if they had been legal limitations arising at the common law, they would have been void as tending to create a freehold *in futuro*.

These two classes will be found to agree with a division proposed by Fearne, Cont. Rem. 399, 400. Fearne's language, which is confined to devises, is as follows:—

> The first sort [of executory devises] is, where the devisor departs with his whole fee simple, but upon some contingency qualifies that disposition, and limits an estate on that contingency.
>
> The second sort of executory devises is, where the devisor, without departing with the immediate fee, gives a future estate to arise either upon a contingency, or at a period certain, unpreceded by, or not having the requisite connection with, any immediate freehold to give it effect as a remainder.

* Because it is impossible for a fee to be so limited as to be determinable at a fixed period. (*Vide infra*, pp. 197, 198.)

Division into *shifting* and *springing* limitations.

This partly corresponds with the division of executory limitations, accordingly as they do or do not defeat an estate previously limited by the same instrument; which is eminently convenient for many purposes of practical discussion. Those which defeat the estate are distinguished by the epithet *shifting:* those which do not, are distinguished by the epithet *springing.* When these epithets are used, the additional epithet, executory, may conveniently be omitted.

Shifting limitations are styled *shifting uses*, when they occur in assurances made by way of use, and *shifting devises* when they occur in wills.

Springing limitations are similarly divided into *springing uses* and *springing devises.*

The distinction between contingent remainders and executory limitations has been so repeatedly pointed out and insisted upon, in the course of the foregoing pages, that the attentive reader will be in no danger of confusing shifting and springing limitations, which are to arise upon a contingency, with contingent remainders. The following examples will illustrate the distinction between the two classes of executory limitations above noted,—(1) those which defeat a previously limited estate, and (2) those which do not.

1. In strict settlements of real estate, made by a settlor in contemplation of his marriage, the limitations regularly begin with a limitation to the use of the settlor and his heirs until the solemnization of the intended marriage; and afterwards to certain other specified uses. These subsequent uses are executory limitations, for they are void as remainders at the common law, since they are limited after a determinable fee. (See p. 202, *infra*, No. 10 of the list there given.)

 Here the precedent fee is a determinable fee, which, if it should determine at all, must determine within the time prescribed by the rule against perpetuities; and the subsequent executory limitations are not in defeasance of the fee, but await its regular determination. If the precedent fee had been a fee simple, any subsequent

limitation must necessarily (if valid) have been in defeasance of it.

2. "One devises lands to his wife, till his son came to the age of twenty-one years, and then that his said son should have the lands to him and his heirs; and if he dies without issue before his said age, then to his [the testator's] daughter and her heirs. This is a good contingent or executory devise to the daughter." (1 Eq. Ca. Ab. 188, pl. 8.) With regard to the devise of the fee to the son, it is to be observed, that the case occurred before the Descent Act, 3 & 4 Will. 4, c. 106; and that the fee simple to the son (which, by the rule in *Boraston's Case*, 3 Rep. 19, is a vested estate) therefore passed to him by descent and not by purchase. But now, by sect. 3 of the last-cited Act, the heir to whom a devise is made, is deemed to take as devisee, that is, as a purchaser, and not by descent. (*Vide infra*, p. 185.) Therefore, at the time when the case was decided, the executory devise to the daughter came under the class of springing limitations, because it was not subsequent to, or in defeasance of, an estate limited by the same instrument. But as the law now stands, the fee to the son would pass by the will, and not by descent; and therefore the executory devise to the daughter would now come under the class of shifting limitations.

Executory interests are descendible and deviseable.

The benefit of an executory limitation, which purports to create a future interest of the *quantum* of a fee, is descendible in a regular course of descent, if or so soon as the person is ascertained in whom it would vest if it should then become vested. (Watk. Desc. 13.) And all executory interests, not determinable by the death of the party, have been held to be deviseable, since the case of *Roe* v. *Jones*, 1 H. Bl. 30; affirmed in B. R. *sub nom. Jones* v. *Roe*, 3 T. R. 88. They are expressly made deviseable by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 3.

At common law executory interests, as being, in the eye of the law, not estates, but only possibilities to have an estate at a

future time, were not assignable by act *inter vivos*. (16 Vin. Abr. 462=*Possibility*, B, pl. 5.) As above mentioned, they might be released to the person entitled subject to them; and they might be bound by estoppel of the party entitled to the benefit of them. Also, in equity they might be assigned, and contracts relating to them might be entered into, for valuable consideration. (*Vide supra*, p. 58.)

Not assignable *inter vivos* at common law.

The Act to amend the Law of Real Property, 8 & 9 Vict. c. 106, s. 6, enacts, that after 1st October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed.

Now made assignable by statute.

For some remarks upon a suggested interpretation of this enactment, see p. 86, *supra*. The words above cited are equally applicable both to contingent remainders and to executory interests. The words permitting assignment before the ascertainment of the object of the limitation, do not, of course, refer to such objects as are not yet in being, as in limitations to the children of an unmarried person; but to such objects as heirs apparent, or heirs presumptive, or the survivor of several specified persons.

By the introduction of executory limitations, and the consequent emancipation of the limitation of legal estates from the rules of the common law, the obstacles opposed by the common law to the creation of what are somewhat vaguely styled perpetuities, were made nugatory in practice. Moreover, the machinery of common recoveries, laboriously built up by the courts to promote freedom of alienation in fraud of the statute *De Donis*, was found to have lost part of its efficacy. For, though it was never doubted that an executory limitation in defeasance of a fee tail might be barred by a common recovery, it was held by three judges of the Court of King's Bench, against the opinion of Doderidge, that an executory limitation in defeasance of a fee simple could not be so barred without the concurrence of the person entitled to the benefit of the executory limitation. (*Pells* v. *Brown*, Cro. Jac. 590.) If such person

How far executory limitations, not subsequent to estate tail, are indefeasible.

had been vouched, and had entered into the warranty, it was agreed that the executory limitation would be barred; but this proceeding would merely have effected by matter of record what might equally well have been effected by release between the parties. The same doctrine is also applicable to estates *pur autre vie*. The opinion was expressed by Preston, that an executory limitation annexed to an estate *pur autre vie*, limited to a grantee and his heirs general, cannot be barred by the first taker; and this has recently been affirmed by judicial decision. (1 Prest. Abst. 438; *Re Barber's Settled Estates*, 18 Ch. D. 624.) Thus it will be seen that, by means of executory limitations, there emerged into practice a new method of interposing an obstacle to the alienation of property.

How barred by fine.

A claim arising under such an executory interest was as much within the language of the Statutes of Fines as any other kind of claim; and therefore it could equally be bound by non-claim on a fine levied with proclamations under those statutes. (1 Cruise, Fines & Rec. 313.) But for this purpose it was necessary that there should be a non-claim of five years' duration after the claim under the executory limitation had become enforceable, that is, had vested in possession; and thus the practical effect of a fine, in this respect, was merely to shorten the ordinary period for the limitation of actions to five years. This restricted power of barring executory limitations, other than executory limitations subsequent to an estate tail, was lost upon the abolition of fines by the Fines and Recoveries Act. It requires carefully to be distinguished from methods of barring executory limitations subsequent to an estate tail, or to a quasi-estate tail carved out of an estate *pur autre vie*. These took effect immediately, and without the expiration of any period of limitation.

Certain executory limitations under certain circumstances made void by statute.

The Conveyancing Act, 1882, s. 10, enacts that, where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over, contained in any instrument coming into operation after 31st December, 1882, on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be

or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation was to take effect.

Remarks upon the above-cited enactment.

It was probably the aim of this enactment to assimilate these executory limitations, in respect to the period of time during which they are secured against destruction, to executory limitations subsequent to an estate tail, contained in a settlement upon a tenant for life, with remainder to his sons successively in tail. Such executory limitations, as well as the estate tail itself, can be, and in practice usually are, barred as soon as any son of the tenant for life has attained the age of twenty-one years.

It is not clear that the provisions of this enactment apply to executory limitations in defeasance of an equitable fee simple. It is still less clear that they apply to executory limitations of a trust of a term of years. The Conveyancing Act of 1881 contains a definition of the word "land," which would undoubtedly include an equitable fee simple; but the Act of 1882 contains no provision for incorporating the definitions of words contained in the Act of 1881; and by separately defining, in almost the same language as the Act of 1881, the words "property" and "purchaser," it seems even to show a design to exclude the definitions of the earlier Act. And in any case, the definition of "land" in the Act of 1881 contains nothing which could include a trust of a term of years. Executory limitations of such trusts are clearly not within the language of the above-cited enactment; and it must not be assumed that they will be held to come within its intention, because the possible existence of executory devises of the legal estate in a term of years gives a sufficient meaning to all the language used.

The obstacles opposed by the common law to the creation of perpetuities having thus been rendered nugatory in practice, it became necessary, either to acquiesce in the creation of limitations by which property might be "tied up" for indefinite periods of time, or else to devise some new restrictions for preventing this result, which should be applicable to the newly introduced limitations. This was effected by the introduction

of the rule which is now commonly known as the "rule against perpetuities;" and as this is the principal, if not the only, restriction now placed by the law upon the creation of executory limitations, it will require a somewhat detailed statement. It will be observed that the Conveyancing Act, 1882, s. 10, though it affects the possible duration of certain executory limitations, does not interfere with their creation.

The Rule against Perpetuities.

General remarks upon the rule.

The rule against perpetuities fixes certain limits of time, within which every executory limitation, not being a limitation subsequent to an estate tail, must necessarily vest, if it vests at all, on pain of being otherwise void. The rule has never been considered to be binding upon limitations subsequent to estates tail, because such limitations have at all times since the invention of executory limitations been liable to destruction, either by means of a common recovery or by the method provided by the Fines and Recoveries Act. Such limitations are therefore not obnoxious to the mischief which the rule was designed to prevent. (See *Nicolls* v. *Sheffield*, 2 Bro. C. C. 215; *Heasman* v. *Pearse*, L. R. 7 Ch. 275.)

The terms of the rule do not import that the limitation must necessarily vest within the specified time, but only that it must necessarily vest within that time, *if it vests at all.* The vesting may depend upon a contingency which is such that, by possibility, it may never happen at all; but it must be such that, if it does happen at all, its happening must necessarily fall within the specified limits. Though it may be such that it either may, or may not, happen within the limits of the specified time, it must be such that it cannot possibly happen outside those limits.

Much elaborate effort has been expended upon attempts to define a "perpetuity," and to found the reason of the rule now under consideration upon the definition. These labours seem to be superfluous. Without any definition of a perpetuity, the proposition is easily intelligible, that all future interests or claims in, to, or upon any specified property, whether real or

personal, which do not arise under, or take effect by virtue of, the rules of the common law, and are not subsequent to an estate tail, must (with a few exceptions requiring specific mention) vest absolutely within certain specified limits of time; and the mischief which would result from the absence of any such restriction, is too obvious to need any proof.

Stages in the rule's development.

The period of vesting (as it may be called) prescribed by the rule against perpetuities, since it is in the nature of a remedy gradually devised by the discretion of the judges, to meet a new mischief arising out of the raising of legal estates by means of uses and devises, could not, from the circumstances of its origin, be clearly ascertained from the commencement.

It will be sufficient to note the following points:—

(1) It was settled by the *Duke of Norfolk's Case*, 3 Ch. Ca. 1, Pollexf. 223, that an executory limitation, which must necessarily vest (if at all) during the life or lives of a specified person or persons *in esse*, is good.

In that case Lord Nottingham, while expressing the opinion that an executory limitation in defeasance of a fee simple (which he used as an example of executory limitations generally) to take effect during a life or lives in being, was indisputably good, further observed that "the *ultimum quod sit*, or the utmost [executory] limitation of a fee upon a fee," was not then plainly determined; but that it would soon be found out, if men should set their wits to contrive that which the law had so long laboured against. (3 Ch. Ca. at p. 36.) The next following paragraph records the fulfilment of this prediction.

(2) It is clearly settled that a term of twenty-one years in gross, that is, limited simply as a space of time and not with reference to the infancy of any person interested, is allowed in addition to the life or lives *in esse*. (*Lloyd* v. *Carew*, 1 Show. P. C. 137; *Cadell* v. *Palmer*, 1 Cl. & F. 372.) This is now regarded as an axiom. In *Cole* v. *Sewell*, 2 H. L. C. 186, at p. 233, Lord Brougham,

while hinting some disapproval, and intimating that this rule had been established by oversight, admitted that it was settled law.

(3) It would have been a very reasonable restriction, if some connection had been established between the person or persons in question and the property; for example, if no life had been thought admissible for the purpose, except the life of a person having a prior life interest in the property, or the life of the parent of a person taking a subsequent interest. But no such restriction seems ever to have been authoritatively suggested. In *Thellusson* v. *Woodford*, 11 Ves. 112, at pp. 145, 146, Lord Eldon plainly lays it down that the number of the lives, being lives simultaneously running, may be unlimited, and that the persons may have no connection with the property; provided only that the circumstances make it possible to ascertain as a fact the dropping of the life of the last survivor of them.

(4) It was first settled in *Long* v. *Blackall*, 7 T. R. 100, that, for the purposes of the rule, a life in being may be the life of a person *en ventre sa mère* at the date of the limitation.

(5) There was never any doubt that an executory limitation might, at the expiration of the period allowed by the rule, vest in a person *en ventre sa mère;* and thus a second period of gestation is allowed, at the end of the prescribed period, if circumstances should require it.

(6) But the periods of gestation above referred to, since they arise only by reason of the doctrine that a person *en ventre sa mère* is, for the present purpose, a person *in esse*, must both of them be periods of actual gestation: that is to say, if there is no person actually *en ventre sa mère* in the case, no extension of time is allowed upon the ground that there might possibly have been such a person. (*Cadell* v. *Palmer*, 1 Cl. & F. 372.)

Expressions have sometimes been used, which might seem to imply, that a period equal to the term of gestation may, as a term in gross, be added to the permitted term of twenty-one years. Such *dicta* seem to be erroneous.

Thus the effect of the rule may be summed up by specifying the longest period, commencing with the coming into operation of the instrument under which the interests arise, during which the vesting of limitations coming within the scope of the rule, may be postponed, as follows:—

Statement of the period of vesting allowed by the rule.

A life, or any number of lives, in being—the life of a person *en ventre sa mère* being considered for this purpose a life in being—and twenty-one years after the dropping of the life, if only one, or after the dropping of the last surviving life, if there be more than one. And at the expiration of the aforesaid period, the executory interest may vest in a person *en ventre sa mère.*

Not only must the title become vested within the prescribed period, but the shares in which different persons are to take the property must also then be ascertained; otherwise the gift will be void for remoteness. (*Curtis* v. *Lukin*, 5 Beav. 147; *Blight* v. *Hartnoll*, 19 Ch. D. 294.)

To what subjects the rule applies.

It is unnecessary to cite particular cases, to show that executory devises, springing and shifting uses, and trusts executed, are bound by the rule against perpetuities. That proposition is now an undisputed axiom of law. The rule also applies to trusts executory. (*Duke of Marlborough* v. *Earl Godolphin*, 1 Eden, 404.) The rule also applies to nondescript equities, not amounting either to *equitable estates* or to *express trusts*, but being in the nature of claims upon specific property, arising out of covenants and other contracts for the assurance, at some future time and upon specified terms, of a proprietary interest. (*London and South Western Railway Co.* v. *Gomm*, 20 Ch. D. 562.) In the last-cited case, the case of *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421, was expressly overruled; together with several earlier cases in which it had been doubted or denied that non-

descript equities arising upon contracts are within the scope of the rule.

Collateral covenants.

But it is necessary that the equity should give a specific claim to some specific property. A general claim to damages, upon the breach of a personal covenant, stands out of all relation to the rule. (*London and South Western Railway Co.* v. *Gomm*, 20 Ch. D. 562, at p. 580. See the judgments delivered in the House of Lords in the case of *Witham* v. *Vane*, Appendix, *infra*.)

Remarks upon *Keppell* v. *Bailey*.

Perhaps the distinction referred to in the last preceding paragraph may serve as an explanation of Lord Brougham's remarks in *Keppell* v. *Bailey*, 2 My. & K. 517, at p. 527, to the effect that the covenant in that case did not tend to a perpetuity. The covenant bound the covenantors to procure all limestone used upon certain works from a specified quarry. There was no proviso for re-entry upon a breach of the covenant; and it would be absurd to say that such a covenant, standing by itself, gives rise to a specific claim upon the quarry, which could in the future mature into a proprietary interest. But in so far as the remarks of Lord Brougham were grounded upon the fact, that the covenantee could at any time release the covenant, they seem to be erroneous; because the same argument would suffice to prove, that no executory limitation can be void for remoteness, provided that it is capable of being released by the person, or persons, entitled to the benefit of it. This doctrine was the foundation of the erroneous decision (now overruled, as above mentioned) in *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421; see p. 433.

It is worthy of observation that, although the general principle laid down by Lord Brougham in *Keppell* v. *Bailey*, namely, that covenants which do not run with the land at law ought not to be enforced in equity against a purchaser taking with notice of them, has been completely discredited by *Tulk* v. *Moxhay*, 2 Ph. 774, and the subsequent cases, yet the decision itself in *Keppell* v. *Bailey* was clearly right, in accordance with the distinction laid down by the Court of Appeal in *Haywood* v. *Brunswick Permanent Benefit Building Society*, 8 Q. B. D. 403; namely, that the principle of *Tulk* v. *Moxhay* does not apply to affirmative

covenants, but only to prohibitive covenants. In *Tulk* v. *Moxhay* the covenant was partly affirmative and partly prohibitive; but the decree dealt only with the prohibitive part: a remarkable circumstance, which seems to have slept unnoticed during the interval between the decision of that case and the case of *Haywood* v. *Brunswick &c. Society* above cited. But the whole principle of *Tulk* v. *Moxhay* rests upon dubious grounds of equity, and it seems, in the courts below, to have been carried to some absurd lengths. It has never been considered by the House of Lords; and it is not improbably destined, like the doctrine of the consolidation of mortgages, to have its wings clipped whenever it shall come before that august tribunal.

Exceptions out of the rule.

The main exceptions out of the operation of the rule, seem to be as follows:—

(1) Conditions in defeasance of a term of years.

It has never been suggested that such conditions are within the scope of the rule, unless (which hardly seems to be the case) a loose remark thrown out *obiter* by Mr. Justice Buller, in *Roe* v. *Galliers*, 2 T. R. 133, at p. 140, amounts to such a suggestion. Since such conditions have come almost daily before the courts during some centuries, there could hardly be a stronger proof that their validity is not open to question.

As to conditions in defeasance of an estate of freehold, some remarks will be found at p. 152, *infra*.

(2) Covenants for the renewal, whether perpetually, or for certain turns only, of leases. (*London & South Western Railway Co.* v. *Gomm*, 20 Ch. D. 562, at p. 579.)

There is perhaps some difficulty, upon principle, in explaining this exception; but its existence is beyond all doubt, and has repeatedly been recognized by the House of Lords. (*Earl of Ross* v. *Worsop*, 1 Bro. P. C. 281; *Pendred* v. *Griffith*, *ibid.* 314; *Sweet* v. *Anderson*, 2 Bro. P. C. 256.) When the covenant is for a perpetual renewal, it is probably regarded by the law as being only an indirect mode of alienating the whole beneficial interest in the fee, under cover of a succession of terms of years.

(3) Negative covenants which are contained in conveyances of the fee, and, upon the principle of *Tulk* v. *Moxhay*, 2 Ph. 774, "run with the land" in equity though not at law. (*London & South Western Railway* v. *Gomm*, 20 Ch. D. 562, at p. 583.)

Whether the rule applies to common law conditions in defeasance of a freehold.

The question, whether a common law condition in defeasance of an estate of freehold, is within the rule against perpetuities, in the sense that it is void if it may defeat the estate at a time more remote than is allowed by the rule, may perhaps, in view of the present disposition of the courts, which leans strongly in favour of the rule, be a question requiring to be treated with some degree of caution. The affirmative reply is open to the obvious objection, that the rules relating to common law conditions had been settled for some centuries before the rule against perpetuities had been thought of, and that there is no trace to be found, in the old common law authorities, of any disposition to apply what may be called a "time test" to common law conditions.

In the old common law authorities, down to and including Lord Coke, there are innumerable references to conditions in defeasance of a freehold, expressed *simpliciter* without any hint of a restriction within any period whatever; and such references invariably assume that the validity of such conditions had never yet been called in question upon this ground. At a subsequent time it became necessary to devise a novel restriction to be applied to novel forms of limiting, or otherwise conferring, an estate or interest unknown to the common law. Upon what principle can it be said, that the emergence of novel matter into the law had simultaneously introduced into the common law a new rule of construction, newly made applicable to matters with which the common law was familiar, but previously unknown to the common law? The prescription upon which the common law depends, is of much greater antiquity than the reign of Henry VIII.

No court, except the High Court of Parliament, has any jurisdiction or authority to alter the common law. (Co. Litt. 115 b.) When any part of the common law is found to require amendment, the legislature alone is competent to apply the

remedy. (*Cunliffe* v. *Brancker*, 3 Ch. D. 393, at p. 410.) In imposing the rule against perpetuities upon the novel limitations and interests to which, by universal acknowledgment, it is applicable, the inferior courts did not alter the common law, but merely laid down certain terms upon which they would interpret certain statutes in relation to the creation of legal estates, and upon which they would give legal effect to equitable interests of a certain type. Much more than this is needed, in order to bring matters previously settled by the common law within the scope of the new rule.

Upon these grounds it is conceived, that there cannot exist any jurisdiction in the courts of law to hold that the rule against perpetuities is, in the sense above mentioned, applicable to common law conditions. But this conclusion refers only to conditions as they exist strictly at the common law, whereby, upon a breach of the condition, a right of entry accrues solely to the grantor of the estate to which the condition is annexed, or his heirs, and cannot be reserved to a stranger. (Litt. sect. 347, and Lord Coke's comment.) The possibility of reverter upon such a condition can neither, at common law, be assigned *inter vivos* nor devised. (Prest. Shep. T. 120.) And it might plausibly be maintained, that 8 & 9 Vict. c. 106, s. 6, and the Wills Act, s. 3, by which such possibilities are made assignable and deviseable, tacitly and by implication impose upon assignments and devises of them, though not upon the conditions themselves, the liability to the rule against perpetuities.

Suggestion as to assignments and devises.

There exists no judicial decision, so far as the present writer is aware, that a strictly common law condition is subject to the rule against perpetuities. In *Flower* v. *Hartopp*, 6 Beav. 476, it was assumed that such a condition was valid in perpetuity in a crown grant; though it was held that the condition had subsequently been destroyed by the act of the crown.

In *Re Macleay*, L. R. 20 Eq. 186, the condition which was in dispute seems to have been a common law condition; and Sir George Jessel, M. R., by the way in which he remarked that, since it was confined to a life in being, it could not be open to any objection upon the ground of remoteness, may be thought to have given an intimation of his opinion. But the mere surmise that he may have intended

to deliver an *obiter dictum*, is a slender foundation upon which to build an important conclusion of law. The expressions of the same learned judge in *London and South-Western Railway* v. *Gomm*, 20 Ch. D. 562, at p. 582, afford no indication of his opinion. He evidently thought that "a limitation to A. in fee, with a proviso that whenever a notice in writing is sent and 100*l.* paid by B. or his heirs to A. or his heirs, the estate shall vest in B. and his heirs," would be within the rule against perpetuities. But, in the words immediately preceding those cited, he styled the limitation, or form of words, to which he meant to refer, a "conditional limitation"; and in all the many meanings of that much-abused phrase, it has at least been always carefully distinguished from a common law condition. In one of its meanings, the phrase "conditional limitation" is used to denote an executory limitation, which is to take effect in defeasance of a prior estate of freehold, upon the happening of a contingency which is in the nature of the performance of a condition. This meaning fits exceedingly well into the words above cited; and no doubt exists that such conditional limitations are subject to the rule against perpetuities. But this proves nothing about common law conditions.

In *Dunn* v. *Flood*, 25 Ch. D. 629, the opinion expressed by Mr. Justice North was *obiter dictum*. Not only is it not material to the decision, but it makes against the decision, so far as it goes.

It may, however, be surmised with some confidence, that at the present day the courts would not acquiesce in the conclusion above drawn without great reluctance. Therefore no conveyancer could be advised, in the absence of express judicial decision, to rely in practice upon the conclusion, that common law conditions are not within the rule against perpetuities. But (granting that no reference to a "time test" can be found in the old common law authorities) every argument that can be derived from history and general principle seems to be in its favour.

Remoteness does not depend upon the event.

The question as to the validity of a particular limitation is to be decided at the time when the instrument under which it arises comes into operation; and the answer to the question is quite independent of what happens to be the course of subsequent events. If it is possible, in the nature of things, that the limita-

tion may not vest until after the expiration of the period specified by the rule, it is void for remoteness; and the subsequent happening of any event whereby, if held to be valid, it would in fact have vested within the specified period, will not make it valid.

Unless at the commencement, there is a vehement presumption as to the event.

It has been held, that the fact that a specified person, a married woman, was, at the date of the coming into operation of the instrument creating a power, past the age of child-bearing, will suffice to take out of the rule a case which, upon the hypothesis that she might subsequently have had children, would have been within its scope. (*Cooper* v. *Laroche*, 17 Ch. D. 368.)

Limitations to a class of objects.

If the limitation is in favour of the whole of a class, as to some of whom it would be good, but as to others it is void for remoteness, the limitation fails as to the whole. (*Pearks* v. *Moseley*, 5 App. Cas. 714.) But this rule seems to be founded, so far as regards wills, upon the intention of the testator to benefit the whole class and not a part only, and, so far as regards deeds, upon the fact that, by the terms of the instrument, the limitation is in favour of the whole class and not of a part only. It is therefore possible, by the use of apt expressions, to construct a limitation in favour of such members only of a class as, with reference to the rule against perpetuities, shall be capable of taking under it.

Failure of limitation does not accelerate subsequent interests.

When a limitation is void for remoteness, any subsequent limitation to take effect after it is not accelerated, but is also void. (1 Jarm. Wills, 4th ed. 283, 284, and cases there cited.)

A *subsequent* limitation must, of course, be distinguished from an *alternative* limitation. In the case of alternative limitations, one of which, standing alone, would be good, while the other, standing alone, would be void for remoteness, the limitation will fail or take effect according to the course of events. (*Ibid.* 285.)

But a void restriction upon an absolute gift, is merely inoperative.

Where a testator by his will first makes an absolute gift of chattels, and by a subsequent clause cuts this gift down to a life interest followed by a limitation over which is void for remoteness, the absolute gift takes effect, unaffected by the attempted

restriction. (*Ring* v. *Hardwick*, 2 Beav. 352; *Taylor* v. *Frobisher*, 5 De G. & Sm. 191; *Goodier* v. *Johnson*, 18 Ch. D. 441.) There seems to be nothing to make this principle less applicable to real estate than to chattels, or to deeds than to wills. But while limitations in the form above supposed are common in wills, they rarely occur in deeds.

Similarly, as to a void direction as to payment of a vested fund

If the right to a fund, or share in a fund, vests within the time limited by the rule, but the will contains a direction, that the fund shall not be paid over until a time which, if it were the time of vesting, would make the gift void for remoteness, this direction is itself inoperative (*Greet* v. *Greet*, 5 Beav. 123), and the fund becomes payable as soon as the person in whom it vests is qualified to give a discharge for it. (*Josselyn* v. *Josselyn*, 9 Sim. 63; *Saunders* v. *Vautier*, 4 Beav. 115; *S. C.* 1 Cr. & Ph. 240; and see *Curtis* v. *Lukin*, 5 Beav. 147, at pp. 155, 156.)

Special powers are within the rule.

When an executory limitation arises under the exercise of a special power of appointment, the time from which the period prescribed by the rule begins to run, is the date of the coming into operation of the original instrument creating the power, not that of the instrument by which the power is exercised. Therefore nothing can be done in exercise of the power, which might not have been done in the original instrument. (Chance on Powers, sects. 1230, 1387; *Re Brown and Sibly's Contract*, 3 Ch. D. 156.) This rule does not apply to general powers, because in their nature they are incapable of operating as a restraint upon alienation. And a special power is not void in its inception, merely by reason that its expressions are sufficiently wide to extend to a possible exercise of it which, if made, would be void for remoteness; but, in general, the validity of the exercise of the power will depend upon the question, whether the exercise does in fact exceed the limits prescribed by the rule against perpetuities; not upon the question, whether it might, under the terms of the power, have exceeded those limits; and if the attempt to exercise the power is *primâ facie* in part good and in part bad, the appointment will be upheld, so far as it keeps within the limits of the rule. (*Slark* v. *Dakyns*, L. R.

10 Ch. 35. See also, *Re Teague's Settlement*, L. R. 10 Eq. 564; *Re Cunynghame's Settlement*, L. R. 11 Eq. 324.)

Powers of sale and exchange.

Doubts have sometimes been expressed, whether the common powers of sale and exchange usually found in strict settlements might not be void, if appearing to be exerciseable indefinitely; and Fearne, and other eminent conveyancers, sometimes expressly restricted the exercise of such powers within the period of lives in being and twenty-one years afterwards. (2 Prest. Abst. 159.) Since the avowed object of the rule is to prevent whatever unduly *restrains* alienation, the objection perhaps sounds oddly, that a power to *effect* alienation might be made void by the rule. It has been decided that unlimited collateral powers of sale, which, so far as they are exerciseable at a time later than the terms of the rule would permit, are subsequent to an estate tail, and are therefore liable to be defeated by a bar of the entail, are valid. (*Waring* v. *Coventry*, 1 My. & K. 249; *Wallis* v. *Freestone*, 10 Sim. 225.) The subject is now deprived of much of its importance, by the provisions of the Settled Land Act, 1882, by which the powers commonly given to trustees of strict settlements, have in a great measure been superseded in practice. It is certain that the common powers of sale and exchange have not, in general practice, been expressly restricted, as to their exercise, within the limits of time imposed by the rule. This amounts to indisputable proof, that such express restriction is not, at all events, necessary to give validity to an exercise of the power which in fact takes place within those limits.

Charitable uses.

It is sometimes said, that gifts to charitable uses are exceptions from the rule against perpetuities. (*Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381, see p. 394. See also *Thomson* v. *Shakespear*, 1 De G. F. & J. 399, at p. 407.) But in this language there are plain traces of confusion between "a perpetuity," as used somewhat vaguely to denote some kind of perpetual ownership not sanctioned by the law, and "the time within which executory limitations must vest in interest." There is no reason to suppose that a gift made to charitable uses by way of executory limitation, if it be such as might by possibility not vest in interest within the specified time, is not void,

like any other executory limitation. The above-cited proposition seems only to mean, that gifts to charitable uses are valid, notwithstanding that the charitable use may exhaust the whole fee simple or absolute interest in the thing given.

Somewhat in a similar spirit it seems to have been said, or intended to be said, that a claim of user which would be bad *simpliciter*, may be made good by the fact that the hereditament, out of which the use arises, is lawfully vested in a corporation by way of mortmain. (*Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633, at p. 669.)

Such points as these have nothing to do with the "rule against perpetuities," in the sense in which it is relevant to the present discussion. They are only noticed for the purpose of anticipating and preventing confusion.

Origin of the rule in its existing shape.

The rule against perpetuities was fixed by reference to what might by possibility happen as the result of legal limitations. At common law, there could be no remainder of inheritance except a remainder in fee simple; and such a remainder could subsist in expectancy only upon an estate for life or *pur autre vie*. After the statute *De Donis*, a remainder of inheritance became possible in the shape of a fee tail. The rules of the common law, which forbade any remainder to be given to the unborn issue of an unborn tenant for life, and which forbade the limitation of an estate of inheritance to the heirs of an unborn person, were designed to introduce into legal limitations some restriction analogous to that applied by the rule against perpetuities to executory limitations. (*Vide supra*, pp. 90—92.) Under the legal rule, the strictest allowable settlement was effected by giving an estate for life to a person *in esse*, followed by remainders in tail to his unborn issue as purchasers. Under such a limitation it might possibly happen that the tenant for life would die, leaving an infant son. The tenant for life and the vested remainderman or reversioner in fee simple could not (after the invention of trustees to preserve contingent remainders) make a good title during the existence of the remainder in fee tail to the unborn issue of the tenant for life; and after the birth of such issue, he, as tenant in tail, could not make, or concur in making, any alienation during his infancy. Thus, the fee simple of the property might be so settled as, by

possibility, to be incapable of alienation during a life in being and the infancy (which might amount to twenty-one years) of his issue. This accounts by analogy for the "life in being and twenty-one years afterwards" of the rule against perpetuities. With regard to the further allowance, by the latter rule, of a period of gestation, both at the beginning and at the end of the time, this seems to be due to the strong disposition of equity to regard a child *en ventre sa mère* as being *in esse* for all purposes. But this was an extension beyond the utmost limits of the time during which, under the strict rules of law, the property could by any possibility have been tied up against alienation; for it is the better opinion that, before the statute 10 & 11 Will. 3, c. 16, if the tenant for life had died leaving a child *en ventre sa mère*, a remainder in fee tail limited in favour of such child would have been destroyed. (*Vide supra*, p. 111.)

Thus it will be seen that the doctrine of executory limitations, though restrained by the rule against perpetuities, reduces to a certainty what by the rules of law can happen only by chance. It permits a restraint on alienation to be imposed always, and as a matter of sure calculation, during the longest period that is possible, under the legal rules, by the happiest concurrence of all contributory accidents.

The rule does not apply to the vesting of legal remainders.

Whether the rule against perpetuities applies (apart from express statutory enactment) to legal limitations made by way of remainder, is one of those questions which ought never to have arisen. It implies an anachronism which may be said to trench upon absurdity. The argument from history and principle against the affirmative doctrine may not intrinsically be stronger than the argument against the application of the rule to common law conditions. But if not intrinsically stronger, it is even more obvious. Legal limitations had flourished for four or five hundred years, and the rules applicable to them had, during that time, been discussed with the greatest assiduity, before the rule against perpetuities had ever been heard of. Moreover, all the authorities concur in the tradition, that the rule against perpetuities was framed upon the analogy of the ascertained effect of the rules applicable to legal limitations by way of remainder. And, though the rule against

perpetuities was framed with reference to the *possible effect* of legal limitations, yet the rule itself, regarded as a proposition, is repugnant to the spirit of the rules applicable to legal limitations. And since estates have always been much more common than estates upon condition, the absolute failure of the old common law authorities, down to and including Lord Coke, to give any hint of any such doctrine, applies with increased significance to the present case. It is incredible, that if any such doctrine had existed, no hint of its existence would have emerged into the records of the law. And in this instance, the claims of reason are aided by some strong expressions of opinion.

One of the greatest real property lawyers since Lord Coke has thus expressed his sentiments :—

Opinion of Sir Edward Sugden.

"As to the question of remoteness, at this time of day, I was very much surprised to hear it pressed upon the court, because it is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question; for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event upon which the contingency depends happen so that the remainder may vest *co instanti* [that] the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as to perpetuity, which is a comparatively modern rule (I mean of recent introduction, when speaking of the laws of this country), was not known; so that, while contingent remainders were the only species of executory estate then known, and uses and springing and shifting limitations were not invented, the law [in the current language of the lawyers] did speak of remoteness and mere possibilities as an objection to a remainder, and endeavoured to avoid remote possibilities; but since the establishment of the rule as to perpetuities, this [kind of language in reference to legal limitations] has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting, or secondary use, not depending on an estate tail, and if it is so limited that it may go beyond a life or lives

in being, and twenty-one years, and a few months equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect, if at all, upon the determination of the preceding estate. In the latter case, the event [upon the happening of which the contingent remainder is to vest] may or may not happen before or at the instant [that] the preceding estate is determined, and the limitation will fail, or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder." (Sir Edward Sugden, in *Cole* v. *Sewell*, 4 Dr. & W. 1, at p. 28.) The judgment of Sir Edward Sugden in that case was afterwards affirmed in the House of Lords, when Lord Brougham very forcibly expressed the same view. (2 H. L. C. at pp. 230, 231.)

In truth, any objection against the validity of a contingent remainder grounded upon the rule against perpetuities, is not so much an objection against the time of the vesting of the remainder, as an objection against the duration of the precedent estate.

Contingent remainders protected by statute must comply with the rule.

It is in accordance with the view above advocated, that the statute 40 & 41 Vict. c. 33, which exempts subsequently-created contingent remainders in general from their liability, at common law, to be destroyed by the determination of the precedent estate pending the contingency, extends this exemption only to such contingent remainders as comply with the rule against perpetuities. (*Vide supra*, p. 112.)

A solitary *dictum* to the contrary.

In *Cattlin* v. *Brown*, 11 Ha. 372, at p. 374, Sir William Page-Wood, V.-C., is reported to have said:—"I apprehend, however, that a contingent remainder cannot be limited as depending on the termination of a particular estate, whose determination will not necessarily take place within the period allowed by law"; by which he appears to have meant, the period prescribed by law for the vesting of executory limitations. This observation seems strongly to support what was said above, that

objections of this kind are really objections against the duration of the precedent estate, not against the vesting of the remainder. The opinion seems to be a solitary *obiter dictum* and hardly sufficient to counterbalance the weight of previous authority; especially as it is manifestly repugnant to principle. The year 1853, as Sir George Jessel, M. R., observed (on another point) in *Re Macleay*, L. R. 20 Eq. 186, at p. 191, was rather a modern time at which to alter the law of real property.

Restrictions upon Trusts, or Directions, for Accumulation of Income.

(*The Thellusson Act*, 39 & 40 *Geo.* 3, *c.* 98.)

How far accumulation is allowed, independently of the Act.

No distinction was drawn by the rule against perpetuities, between the right to suspend the vesting of an estate or interest, and the right to dispose of the intermediate income before its vesting; and therefore, independently of statute, the law permitted a settlor to direct accumulation to be made during the whole of the period for which he was permitted to suspend the vesting of an executory interest. Taking advantage of this rule, Mr. Thellusson fixed on the lives of all his sons and grandsons born in his lifetime or living at his death, including any then *en ventre sa mère*,—for such seems to be the construction of his will,—as the period during which his property (amounting, it is said, to 5,000*l. per annum* in land, with personal estate to the value of 600,000*l.*) should accumulate for the benefit of those branches of the respective families of his sons, who, at the end of that period, should answer to the description of the heirs male of the respective bodies of those sons; thus dividing the property into three parts, and giving one third part to the family of each son. It was calculated at the time that the accumulation would probably endure for about seventy or eighty years; and this period might possibly have been further prolonged by the infancy of the persons in whom, under the limitations, the property would ultimately vest. According to the common mode of calculating the rate of increase, property would be multiplied more than a

Will of Mr. Thellusson.

hundredfold in the course of a century of unintermitted accumulation. This rate would give, in the present instance, a sum approaching to one hundred millions as the amount finally to be divided. It will indeed be observed that Mr. Thellusson's directions kept well within what is the acknowledged limit independently of statute; for he might, without infringing upon the rule against perpetuities, have substituted, for the contingent addition arising from possible infancy, a further fixed period of twenty-one years.

Mr. Thellusson succeeded in his object, and his will was established by a decree of Lord Loughborough, *Thellusson* v. *Woodford*, 4 Ves. 227, afterwards affirmed in Dom. Proc. 11 Ves. 112. In consequence of this decision, the statute 39 & 40 Geo. 3, c. 98, commonly called the Thellusson Act, was passed to prevent such abuses of the letter of the law for the future. This Act does not at all affect the rule against perpetuities, but deals only with the period during which an accumulation of the income may be directed in a settlement. This period which, independently of statute, is the whole period during which the vesting of the *corpus* out of which the income is to arise may be suspended, must now by virtue of the Act, with certain exceptions to be presently noticed, be confined within some one of the following limits:—

Accumulation now restricted by statute.

(1.) During the life or lives of the settlor or settlors;
(2.) During the term of twenty-one years from the death of the settlor;
(3.) During the minority, or respective minorities, of any person or persons living, or *en ventre sa mère*, at the time of the settlor's death; or
(4.) During the minority, or respective minorities, of any person or persons who under the settlement would, for the time being, if of full age, be entitled to the income directed to be accumulated.

The Act applies equally to settlements of real and of personal property.

The settlor may adopt any one, or more, of these periods.

The distinction between the third and the fourth is, that in the fourth case, the minors, during whose lives accumulation is permitted, may be persons neither born, nor respectively *en ventre sa mère*, at the time of the settlor's death. But this latitude of selection is compensated by the condition, that in the fourth case the minors must be prospectively entitled to the income.

If an interval is directed between the testator's death and the commencement of the accumulations, this will not enable the process of accumulation to be continued after twenty-one years have elapsed from the testator's death. (*Webb* v. *Webb*, 2 Beav. 493.)

How far trusts for accumulation are void for excess.

It is now settled that any provision which exceeds these limits, without transcending the limits allowed previously to the Act, is not void *in toto*, but is good for such a period of accumulation as might lawfully have been directed, being void only for the residue. (*Griffiths* v. *Vere*, 9 Ves. 127; *Longdon* v. *Simson*, 12 Ves. 295; *Haley* v. *Bannister*, 4 Madd. 275.)

But if the period prescribed for accumulation should exceed the limits allowed previously to the Act, that is, should extend beyond the time prescribed for the vesting of executory interests by the rule against perpetuities, the direction for accumulation will be void *in toto*. (*Lord Southampton* v. *Marquis of Hertford*, 2 Ves. & B. 54; and see *Leake* v. *Robinson*, 2 Mer. 363, at p. 389; *Marshall* v. *Holloway*, 2 Swanst. 432.)

What becomes of surplus accumulations.

With regard to such part of the accumulations, directed to be made by will, as may be void under the Act, there is an intestacy, unless the property from which the accumulations arise is absolutely vested, subject only to the direction for accumulation. (*Weatherall* v. *Thornburgh*, 8 Ch. D. 261.) So far as such surplus accumulations are derived from real property, they will go to the heir, and, so far as from personal property, to the next of kin. In the case of a settlement made by deed, there will, upon the same principle, be a resulting trust of all such void accumulations to the settlor. If there is a residuary bequest of the personal estate, the surplus accumulations will fall into this residue. (*Haley* v. *Bannister*, 4 Madd. 275; *O'Neill* v. *Lucas*,

2 Keen, 313; *Attorney-General* v. *Poulden*, 3 Ha. 555; *Jones* v. *Maggs*, 9 Ha. 605.) If the residue is settled by way of succession, the surplus accumulations form part of the *corpus*. (*Crawley* v. *Crawley*, 7 Sim. 427.) If there is a residuary devise, the surplus accumulations of residue, in the absence of evidence of a contrary intention in the will, go to the residuary devisee, by virtue of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 25.

Exceptions from the Act's restrictions.

The excepted cases, to which the Act's restrictions do not extend, are as follows:—

First exception.

(1.) The Act does not extend to any provision for payment of debts, whether of the settlor or of any other person. (Sect. 2.)

Second exception.

(2.) The Act does not extend to any provision for raising portions for any children of the settlor, or for any children of any person taking any interest under the settlement. (Sect. 2. See on this subject, *Morgan* v. *Morgan*, 4 De G. & Sm. 164, at pp. 171—174.)

If this second exception should be construed literally, it would seem to open a tolerably wide door to evasion. The following suggestion has been made upon this point:—"It is conceived that the word interest, as used in the second of the above exceptions, refers to a freehold interest, or at least to a long term for years, in the property, the income of which is directed to be accumulated, or to an interest in the funds accumulated, considered as a certain *corpus*, analogous to a corporeal hereditament; and that it does not refer to a mere right to something issuing out of or collateral to such property or accumulated funds. Indeed, if it were otherwise, the exception would open so wide a door to provisions for accumulation, as virtually to repeal the Act." (Smith on Executory Interests, p. 422.) But this suggestion seems to savour rather of reconstruction than of interpretation. There is nothing (as the learned author in effect admits) to suggest a freehold interest rather than a term of years; and there is nothing in the Act's language to suggest a long term of years rather than a short one.

Third exception.

(3.) The Act does not extend to any direction touching the produce of timber or wood upon any lands or hereditaments. (Sect. 2.)

Ireland and Scotland.

The Thellusson Act, having been passed before the union of the British and Irish legislatures, does not extend to Ireland; and by sect. 3, its application to heritable property in Scotland was expressly prevented. But now, by 11 & 12 Vict. c. 36, s. 41, its provisions are extended to heritable property in Scotland. English leaseholds, and of course, *à fortiori*, English freeholds, are bound by the Act, irrespectively of the testator's domicil. (*Freke* v. *Lord Carbery*, L. R. 16 Eq. 461.)

PART III. THE NATURE AND QUANTUM OF ESTATES.

CHAPTER XV.

OF A FEE SIMPLE.

IN the language of the English law, the word *fee* signifies an *estate of inheritance* as distinguished from a *less estate;* * not, as in the language of the feudists, a *subject of tenure* as distinguished from an *allodium*. Allodium being wholly unknown to English law, the latter distinction would in fact have no meaning.

Its *quantum* and incidents.

A *fee simple* is the most extensive in *quantum*, and the most absolute in respect to the rights which it confers, of all estates known to the law. It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination, including the right to commit unlimited waste; and, for all practical purposes of ownership, it differs from the absolute dominion of a chattel, in nothing except the physical indestructibility of its subject.

Besides these rights of ownership, a fee simple at the present

* "*Feodum* is the same that inheritance is." (Litt. sect. 1.) Lord Coke expressly admits that the usage here adopted is the more correct, though he has not chosen to adhere to it. "Of fee simple, it is commonly holden that there be three kinds, viz. fee simple absolute, fee simple conditionall, and fee simple qualified, or a base fee. *But the more genuine and apt division were to divide fee, that is, inheritance, into three parts*, viz. simple or absolute, conditionall and qualified or base." (Co. Litt. 1 b.) Also in the next page he says:—"And therefore, seeing fee simple is *hæreditas legitima vel pura*, it plainly confirmeth that the division of fee is by his [Littleton's] authority rather to be divided as is aforesaid than fee simple."

day confers an absolute right, both of alienation *inter vivos* and of devise by will.*

Practical restrictions.

These remarks must be understood in their general application, which refers to an individual tenant, as distinguished from an ecclesiastical corporation, (lay corporations, when entitled to hold lands in fee simple, having generally the same powers and rights as individual owners,) seised absolutely to his own use, in possession, free from incumbrances; in which last word must for this purpose be included easements and profits *à prendre*. The legal powers of a trustee are practically restricted by the terms of the trust; those of an ecclesiastical corporation, partly by the common law, and partly by numerous statutes; and those of the owner of a servient tenement, by the rights of the owner of the dominant tenement; and a similar restriction must be made in respect to profits *à prendre*.

At the common law, a condition may be annexed to an estate of fee simple, by a breach of which, if it is a negative condition, or by the performance of which, if it is a positive condition, a right of entry accrues to the grantor or his heirs; and if an entry be made, the estate to which the condition is annexed is destroyed; whereby the fee reverts to the grantor or his heirs, in the same manner in all respects as before the grant of the estate subject to the condition. But the benefit of a common law condition cannot be reserved to a stranger; nor is the estate subject to the condition destroyed, until an entry has been made in pursuance of the right of entry. (Litt. sect. 347, and Lord Coke's comment.)

Moreover, the existence of executory limitations, which are of recent origin in comparison with the common law, renders it possible at the present day to vest an estate in fee simple in a tenant, subject to a liability to be defeated, or shifted to another owner. The liability to defeasance by executory limitation differs in two respects from the liability to defeasance by a common law condition,—(1) the benefit of an executory limitation

* For some remarks upon the restrictions affecting alienation *inter vivos*, during the interval between *Magna Carta* and 12 Car. 2, c. 24, see p. 19, *supra*. Some remarks upon the history of alienation by *devise* will be found at the end of this chapter.

may be reserved to a stranger; and (2) an executory limitation takes effect without an entry made by the person entitled to the benefit of it.

The possibility of the existence of the above-mentioned restrictions and liabilities must be taken into account, while enumerating the powers and privileges of a tenant in fee simple. These restrictions and liabilities (except trusts, which are generally destroyed by an alienation of the legal estate to a purchaser for value without notice of the trust) cannot be got rid of by alienation or devise, but continue to affect the estate in the hands of the assign or devisee. The subject is further complicated by the fact, that courts of equity to some extent interfere with the common law rights of a tenant in fee simple, when his estate is subject to an executory limitation, for the benefit of the person entitled thereunder. Upon this last point, some remarks will be found at p. 172, *infra*.

Its limitation to natural persons, as distinguished from corporations.

The *quantum*, or extent of the possible duration, of the estate is accurately measured by the express limitation to the *grantee and his heirs* simply. No greater duration than this can be conceived for an *estate* as distinguished from *absolute dominion*. It is impossible for a failure of heirs to take place by the actual (as distinguished from the constructive) non-existence (as distinguished from the non-appearance) of any person standing in any of the required degrees of relationship to the tenant; for failure of heirs even by reason of bastardy, is in this sense only a construction of law and not a fact of nature. Such a failure can take place only by some of the means previously enumerated under the title *escheat*. These the law does not presume, not even a mere failure of heirs* without attainder; and it therefore presumes that a fee simple will in fact endure for ever. In this respect the *quantum* of a fee simple is greater than the *quantum* of all modified fees, which, though they may endure for ever, are not presumed by the law so to do, and upon which there is a

* "For the law doth not expect the determination of a fee by his dying without heirs." *Pells* v. *Brown*, Cro. Jac. 590, at p. 592. Attainder, as has been remarked above, does not now cause corruption of blood or failure of heirs. See 33 & 34 Vict. c. 23, s. 1.

possibility of reverter, or, in the case of fees tail and base fees, a remainder or reversion, instead of an escheat.*

The word *heirs* necessary in express limitations.

Before the coming into operation of the Conveyancing Act of 1881, the word *heirs*, accompanied, it would seem, by the possessive pronoun, was necessary to be used in the express limitation of all fees, or estates of inheritance, to a natural person or persons, as distinguished from a corporation. (Litt. sect. 1.) Lord Coke also lays stress upon the copula *and*. (Co. Litt. 8 b.) But it does not appear, from his observations, that the copula was necessary, except in so far as it might be necessary to prevent the limitation from being void for uncertainty. And in *Wright* v. *Wright*, 1 Ves. sen. 409, at p. 411, Lord Hardwicke seems to have thought that, even in a deed, the word *or* would be treated as a clerical error for *and*, and be construed accordingly.

At common law, the proper words, and the only words that can with perfect safety be used expressly to limit an estate in fee simple, are the following:—To A. AND HIS HEIRS; or, if there be several grantees, To A., B., &c., AND THEIR HEIRS. In practice, the additional words, AND ASSIGNS FOR EVER, are, and long have been, in common use; but it is beyond doubt that, though harmless, they are, and always were, superfluous.

The doctrine of Hargrave, note 4 on Co. Litt. 8 b, that, "according to many authorities, *heir* may be *nomen collectivum*, as well in a deed as a will, and operate in both in the same manner as *heirs* in the plural number," is stated by Preston to be founded upon a mistake: the authorities cited by Hargrave referring only to limitations contained in wills. (2 Prest. Est. 9.)

In the limitation of a fee simple, the word *heirs* always bears its general meaning, when standing alone and unqualified by words to restrict it to heirs of the body. Its significance is not liable to be restricted to any particular class of heirs, by reason merely of the fact that, under the special circumstances of the

* Upon the subordination, in point of *quantum*, of different species of fees, see 3 Prest. Com. 169, 170. But in a certain sense, all common law fees are equal; in that the grant of a modified common law fee exhausts the whole estate of the grantor, even though seised in fee simple absolute. See Lord Coke on Litt. sect. 11. But his language implies that there is some distinction between them, in point, as he styles it, of "perdurablenesse."

case, only a particular class of heirs is capable of an actual inheritance by virtue of its use.

A limitation to a bastard and his heirs gives a fee simple, not a modified fee; although only the heirs of his body are, under the circumstances, capable of inheriting. (1 Prest. Abst. 273; 2 Prest. Est. 358, 359.) And similarly, even at common law, of an alien, and a man attainted of felony; though at common law they could have no heirs. (Co. Litt. 2 b.)

Cases of informal, and of implied, limitation.

But, it must be observed, (1) that the limitation, where it was necessary, was not always necessarily *express;* and (2) that all limitation whatsoever was, in some cases, unnecessary.

(1) Informal limitation by words of *direct and immediate reference* would suffice. Thus, a father might infeoff his son, *habendum* to him and his heirs, and the son afterwards infeoff the father "as fully as the father infeoffed him." (Co. Litt. 9 b.)

(2) In some cases no limitation was required. Thus, one of several coparceners, or one of several joint tenants, seised in fee simple, might release to another without words of limitation. (Co. Litt. 9 b; Litt. sect. 304.) On a partition between two coparceners seised in fee simple, a rent granted by one to the other for equality of partition, without words of limitation, was in fee simple. (Prest. Shep. T. 101; Co. Litt. 10 a.) By a bargain and sale for valuable consideration, the fee simple might pass without limitation (10 Vin. Abr. 235 = *Estate*, K. 2, pl. 2); as also by a fine *come ceo*, and a fine *sur concessit* (Shep. T. 4; 1 Salk. 340; 2 Prest. Est. 51, 52); and by a recovery (Co. Litt. 9 b; 2 Cruise, Fines & Rec. 15.)

Statutory words of limitation.

Sect. 51 of the Conveyancing Act of 1881 enacts, that in deeds executed after the 31st December, 1881, it shall be sufficient, in the limitation of an estate in fee simple, to use the words *in fee simple* without the word *heirs*.

Both the *quantum* of the estate, and also the privileges of user (as distinguished from the right, or capacity, to alienate) which it confers, are the same when it arises by implied limitation, or without limitation, as when it arises by express limita-

tion. And, generally, it may be said that the rights of a tenant in fee simple, both at law and in equity, are independent of the method by which his estate arises. But this proposition is subject, in equity, to some modification, when his estate is liable to be defeated by an executory limitation.

Restrictions imposed by equity, when the estate is subject to executory limitation.

It was formerly thought that a tenant in fee simple, whose estate is liable to be defeated by an executory limitation, stood in equity in no better position, as regards the right to commit waste, than a tenant for life punishable for waste. (*Robinson* v. *Litton*, 3 Atk. 209; *Stansfield* v. *Habergham*, 10 Ves. 273.) But it has more recently been decided that, in the absence of express provision, he is practically in the same position as a tenant for life without impeachment of waste. (*Turner* v. *Wright*, 2 De G. F. & J. 234; see p. 246.) Such a tenant in fee simple may be made punishable for waste by an express provision contained in the instrument under which his estate arises. (*Blake* v. *Peters*, 1 De G. J. & S. 345.)

Since the liability to defeasance by executory limitation follows the estate into the hands of an assignee or devisee, it implies a disability to alienate for an unincumbered fee simple.

Statutory powers.

But a tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event, has, when his estate is in possession, the powers conferred upon a tenant for life under a settlement by the Settled Land Act, 1882. (See sect. 58, sub-s. 1, ii., of that Act.) These include powers of sale, exchange, and partition. The effect of sect. 58, sub-s. (2), and sect. 20, seems to be, that estates limited by assurances executed by virtue of these statutory powers, will be valid as against all persons claiming any estate to which the settlor, who created the fee simple subject to the executory limitation, was entitled at the time when the instrument, under which such fee simple arises, came into operation; but are subject to all charges and assurances made for money actually received between that time and the exercise of the statutory power. An executory limitation, in defeasance of a fee simple, if it be to take effect on default or failure of all or any of the issue of the person entitled, subject thereto, will now, by the Conveyancing Act, 1882, s. 10, become void so soon as there is

living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation was to take effect.

The limitation of fees simple to corporations.

Except in the case of a gift in frankalmoigne, the use of the word *successors* is necessary, by the common law, for the limitation of a fee simple to a corporation sole; and without it only an estate passed for the life of the existing incumbent. (Co. Litt. 94 b.) It is uncertain whether, by virtue of the Conveyancing Act of 1881, s. 51, the limitation can now be effected by the use of the words *in fee simple*. The mention of *heirs* in that enactment suggests that its application is confined to cases where the use of the word *heirs* was formerly necessary; and, therefore, that it has no application to corporations.

In the case of corporations aggregate, a distinction formerly existed between corporations of which not only the head, but also the body, were persons capable in law, as a dean and chapter, and corporations of which all the members, except the head, were dead in law, as an abbot and his convent. The former always took, and still take, a fee simple, by a mere grant to the corporation under its corporate name, without the use of the word *successors* or of any words of express limitation. (Co. Litt. 94 b.) Corporations of the latter kind no longer exist in England. Words of succession were needed in order that they might take a fee simple, to the same extent as in the case of a corporation sole. But it seems that, in the case of all corporations aggregate having a head, whether the body consists of persons capable in law or dead in law, the grant of an *immediate* estate, during a vacancy of the headship, is void; but the grant of a remainder is good, provided that a new head be appointed during the continuance of the particular estate. (Co. Litt. 264 a.)

On the sufficiency of the word *frankalmoigne* to pass a fee simple under appropriate circumstances, *vide supra*, p. 10.

Restrictions imposed upon ecclesiastical corporations.

The nature of an estate is practically ascertained by the privileges of ownership and alienation which it confers. At common law these were identical in the case of individual owners and of lay corporations. The rights of ecclesiastical

corporations, who are only seised in right of their churches, were less absolute. They could not levy a fine, or bar their successors by non-claim on a fine levied by others. (Cruise, 1 Fines & Rec. 288.) Ecclesiastical corporations sole could not alienate, except subject to certain precautionary consents; alienations by bishops needing confirmation by the dean and chapter, and alienations by parsons needing confirmation by the patron and ordinary; and being, without such confirmation, good during the life only of the existing incumbent. (Co. Litt. 44 a.) Their power at common law to alienate (including power to lease) has been greatly abridged by numerous statutes.

Quantum of the estate taken by a corporation.

That a fee simple limited to a corporation was, as regards the *quantum* of the estate, not precisely identical with a fee simple limited to a grantee and his heirs, appears from the fact that, as above mentioned, upon the dissolution of a corporation there was a reverter to the donor, not, as upon a failure of the heirs of an individual grantee, an escheat to the lord. But the donor is deprived of his reverter by the alienation of the corporation; and for this reason Preston speaks of corporations as having a fee simple for the purpose of alienation, but only a determinable fee for the purpose of enjoyment. (1 Prest. Abst. 272.) By reason of the existence of this possibility of reverter, a condition against alienation annexed to a fee simple is said to be good in a limitation to a corporation; though bad in a limitation to an individual. (Shep. T. 130; 2 Doct. & Stu. c. 35.)

History of the power to devise by will.

At common law a fee simple conferred no power to devise by will. (Co. Litt. 111 b.) But a local custom to devise was good, and existed in the city of London and in many ancient boroughs. (Litt. sect. 167, and Lord Coke's comment.) Lands in the city of London might be devised by the owner, although he was not a citizen. (Dy. 255 a, pl. 3; when note the usage of the word "*foreigner*.") The custom does not extend to a remainder, or reversion, in expectancy upon a fee tail; because, by the common law there could be no such remainder or reversion; and the statute *De Donis*, though it makes such remainders and reversions capable of existence, does not enlarge the extent of the custom. (4 Com. Dig. 119.)

The Statutes of Wills.

The 32 Hen. 8, c. 1, explained and amended by the 34 & 35 Hen. 8, c. 5, enabled tenants in fee simple generally to devise the whole of their lands held by tenure in socage, and two-thirds of their lands held by tenure in knight service; with certain disabilities affecting the tenants of the king *in capite*, holding by knight service *ut de coronâ;* that is, directly of the king through the king's grant, and not mediately through an Honour coming to the king's hands by forfeiture or escheat. (*Vide supra*, p. 4, note.) These statutes are commonly referred to as the Statutes of Wills. Their provisions, which are exceedingly prolix, are thus summarised by Lord Coke:—"These statutes take not away the custome to devise whereof Littleton [sect. 167] speaketh: for though lands devisable by custome be holden by knights service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole. But the devise of lands holden by knights service by force of the statutes is utterly void for a third, and the same [the third part] shall descend to the heire. If he hath any lands holden by knights service *in capite* [that is, *ut de coronâ*], and lands in socage, he can devise but two parts of the whole; but if he hold lands by knights service of the king, and not *in capite* [that is, *ut de honore*], or of a meane lord, and hath also lands in socage, he may devise two parts of his land holden by knights service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his lifetime he conveyeth any part of his lands to the use of his wife or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will no more, but to make up the land so conveyed [to] two parts of the whole. And if the lands so conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land onely that is holden in socage, then he may devise by his will all his socage land." (Co. Litt. 111 b.)

The last words show that, upon the abolition by 12 Car. 2, c. 24, of all lay tenures (at common law) except socage, complete power was acquired to devise all lands held in fee simple. The statute took effect retrospectively, as from 24th February, 1645.

Ever since that date, a legal fee simple has conferred upon its owner, during his ownership, an absolute and unfettered power of devise; but subject, as to the estate in the hands of the devisee, to any incumbrances, restrictions, and liabilities, to which it was subject in the hands of the testator. The subsequent statutory alterations and amendments of the law of devise, do not seem in any way to enlarge the power to devise previously possessed by a legal tenant in fee simple. These statutory alterations and amendments refer, partly to alterations in respect to ceremonies necessary for the due execution of a will, partly to fixing the time, from which a will is supposed to speak, at the date of the testator's death instead of the date of the execution of the will, and partly to rendering deviseable certain estates and interests other than legal estates in fee simple.

The Statutes of Wills were repealed by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 2. But sect. 3 of that Act confers upon every person not under special disability, power to devise all real estate to which he shall be entitled at the time of his death; and by virtue of the definition clause, the words *real estate* extend to any estate, right, or interest, other than a chattel interest, in any hereditaments, notwithstanding that he may become entitled thereto subsequently to the execution of his will.

The same enactment expressly includes within its provisions "all rights of entry for conditions broken, and other rights of entry." This language is undoubtedly sufficient to include the possibility of the reverter of an estate of fee simple, upon breach (or performance, as the case may require) of a condition.

Whether the possibility of reverter upon a determinable fee is now deviseable.

It is at least doubtful whether the language of the Wills Act is sufficiently wide to include the possibility of reverter expectant upon the determination of a determinable fee. But it is not improbable that, if the question should arise, such a possibility would be held to pass under a will clearly showing an intention to devise it. The question is not likely to arise in practice, because the only kind of determinable fee which is commonly found in practice, is the kind specified at p. 202, *infra*,

No. 10 of the list there given ; and this kind of determinable fee is in practice always so limited, as to be replaced by a series of executory limitations in case the intended marriage should take place, while it would *ipso facto* be converted into a fee simple absolute, in case either party to the intended marriage should die without having been married to the other. In neither case, therefore, could the title under the possibility of reverter give rise to a question of practical importance.

CHAPTER XVI.

THE DESCENT OF A FEE SIMPLE.

The same man may have several distinct heirs-at-law.

It ought always to be borne in mind, but it is in fact often forgotten, that the phrase *heir-at-law* has no meaning except in reference to *an estate to which the person so designated might possibly succeed by inheritance.* The same man, if he should be seised as purchaser in fee simple of lands subject to different customs of descent, may leave several distinct heirs-at-law. If he should die intestate, leaving sons, his heir-at-law, as to lands which are subject to no special custom, is his eldest son; his heir-at-law, as to borough-english lands, is his youngest son; and his heir-at-law, as to gavelkind lands, will be composed of all his sons taking together as coparceners. And other special customs may lawfully exist, affecting lands in particular manors or boroughs, which may multiply still further his capacity for leaving distinct heirs. (*Vide supra*, p. 14.)

Why special customs of descent are more common in connection with copyholds.

Special customs affecting the descent of lands held for a fee simple, are much more commonly found in connection with copyholds held for a customary fee simple, than in connection with lands held for a fee simple by common law tenure. The causes of this greater frequency are twofold. In the first place, custom is the life of copyhold tenure, and peculiarities of custom in connection therewith have always been much more common than in connection with common law tenure. In the second place, customs affecting copyhold tenure have a much stronger tendency to be remembered and preserved in practice, because the manorial incidents of copyhold tenure are generally more valuable, and better worth insisting upon, than the manorial incidents of freehold tenure. To this must be added the effect of the statute of *Quia Emptores*, which is gradually to extinguish the tenure of freehold lands held for a fee simple of mesne lords, and to concentrate all such tenure in the Crown. The severance

of lands from their local tenure, tends to cause circumstances of local custom connected therewith to fall into oblivion. It may easily happen that several generations may elapse without the occurrence of a descent; and in such a case, when next a descent takes place, it may easily be assumed, without inquiry, that the law regulating the descent is the general law relating to the descent of a fee simple. But in the case of copyholds, where the fact of the tenure is preserved in memory by the entries on the court rolls, and where the particular lands are parcel of a class, which may be a large one, all of which are well known to be subject to the same customs, the accident that a particular parcel has not for a long time been the subject of a descent, has comparatively little tendency to cause oblivion of the special custom of descent, if any such custom is applicable.

Rules of descent unaffected by questions of domicil.

The rules of descent are not dependent solely upon the rules of *personal status*, in respect to questions of legitimacy, and of consequent qualification to inherit. Thus, the law of a man's domicil of origin is conclusive as to his legitimacy in respect to personal status, but such legitimacy is not conclusive in respect to his right to inherit under the law of descent. A person may, in respect to personal status, be legitimate though not born *ex justis nuptiis;* but, in relation to the law of descent, birth *ex justis nuptiis* is an indispensable requisite to heirship. (Co. Litt. 7 b. *Re Don's Estate*, 4 Drew. 194.) In that case a son of Scotch parents, born out of wedlock, but made legitimate under the law of Scotland by the subsequent marriage of his parents, had died seised by purchase of land in England after the coming into operation of the Descent Act. On his death intestate and without issue, the father claimed to be entitled to inherit to him, by virtue of sect. 6 of the Act. It was held that he was not so entitled, although, in respect to personal status, the son to whom he claimed to inherit was legitimate. The father's claim must have been based upon the contention that in sect. 6 the word "issue" is not restricted to the sense of "inheritable issue," according to the meaning of these words in English law; and this contention, if acceded to, might equally well have justified the further conclusion, that the word issue there includes natural issue, or bastards in the usual meaning of the term. When a word has several meanings, one only of which

is appropriate to the context, then, so soon as that meaning is rejected as being too narrow, it becomes a mere question of caprice where the line is to be drawn for excluding any of the others.

On the Distinction between Seisin in Deed and Seisin in Law.

The bearing of this distinction upon descents.

By the common law, upon the death of a person entitled to an estate in fee simple, the lands (unless subject to a special custom of devise) necessarily descended to the person next entitled as heir. After the passing of the Statutes of Wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5, the effect of which was completed by the conversion of all lay tenure into socage by 12 Car. 2, c. 24, such descent was liable to be prevented by a devise to a stranger; but even then if a devise were made to the person who would have taken as heir if no devise had been made, such heir took by descent and not by the devise. (Watk. Desc. 270.) The question arises, given the rules for ascertaining the heir to a specified person, from what specified person ought heirship to be deduced upon a descent cast; and by the common law, the person from whom heirship was deduced was not the person last entitled, but the person who, under the title, had last had *seisin in deed* of the lands. (Co. Litt. 11 b.) Such person was accordingly, at the time of a descent cast, said to be the *stock* (more properly, the *root*) *of descent*. A *seisin in law* did not suffice to make the person so seised the stock of descent. (*Ibid.*) This rule of descent has been superseded by the Descent Act, 3 & 4 Will. 4, c. 106, s. 2, which enacts that in every case descent shall be traced from the purchaser, that is, from the person who last acquired the land otherwise than by descent; whereby it has now become superfluous to inquire, who last had seisin in deed of the lands. By this change in the law, the importance of the distinction between seisin in deed and seisin in law has been much diminished; but it is even now not without some practical interest, and a correct apprehension of it is very necessary in examining old titles.

Seisin indeed defined.

Seisin in deed is less properly, though conveniently, styled actual seisin; which last phrase properly denotes the seisin of

the person having the immediate freehold as distinguished from the remainderman and reversioner, who are all said to be "in of the same seisin." With regard to estates of freehold in corporeal hereditaments, that is, in lands, seisin in deed is obtained when the person entitled to possession by virtue of the estate enters actually and corporeally into possession of the lands, either by himself, or his bailiff; and the possession of his tenant for years, or from year to year, or at will, is in law accounted to be his possession. Therefore, if at the time of the descent cast, the lands are held by a tenant for years, the heir acquires the seisin in deed at once by the descent without entry. (Co. Litt. 15 a; Watk. Desc. 66.) The possession of other persons having chattel interests only, such as tenant by elegit, tenant by statute merchant, or tenant by statute staple, was also, in contemplation of law, the possession of the person entitled to the freehold subject to such chattel interest, and was a sufficient possession in him to convert his seisin in law into a seisin in deed. (Watk. Desc. 64, 65.) With regard to incorporeal hereditaments which admit of estates in possession, such as a rentcharge or an advowson in gross, seisin in deed is evidenced by, and consists in, the doing of some appropriate act of ownership, such as receiving the rentcharge, or exercising the right of presentation to the benefice. With regard to estates in remainder or reversion, upon an estate of freehold, which are incorporeal hereditaments in which *ex vi termini* no estate in possession is possible, and therefore no entry could be made, a seisin in deed, sufficient to make the person obtaining it the root of descent, might be obtained by exercising certain acts of ownership, such as by granting a lease for life to take effect out of the remainder or reversion, or, in the case of a reversion, by receiving the rent (if any) reserved at the creation of the precedent estate of freehold. (Watk. Desc. 108.)

As to remainders and reversions.

Seisin in law is the seisin of the heir upon whom the estate in possession descends, or of the remainderman or reversioner whose estate has become the estate in possession by the determination of a precedent particular estate of freehold, before such heir, remainderman, or reversioner, has made an actual entry upon the lands. And similarly, in the case of incorporeal here-

Seisin in law defined.

ditaments which admit of estates in possession, such as a rentcharge or an advowson in gross, the seisin in law is in such heir, remainderman, or reversioner, before he has done any appropriate act of ownership, such as receiving the rentcharge or presenting to the benefice.

Distinction between a seisin in law and a right of entry.

But seisin in law is only a presumption of the law, which is incompatible with, and is rebutted by, the fact that a seisin in deed, or actual seisin, is, whether rightfully or wrongfully, in anybody else. If the person actually seised by lawful title, is disseised by a disseisor, the person disseised has not a seisin in law, but only a right of entry. So if, before the entry of the heir, a stranger should (wrongfully) enter in fact upon the lands,—which wrongful entry was technically styled an *abatement*, and the stranger so entering an *abator*,—the heir no longer has a seisin in law, but only a right of entry. And if, before the entry of the remainderman, or reversioner, a stranger should in like manner enter,—which entry was technically styled an *intrusion*, and the stranger an *intruder*,—the remainderman or reversioner no longer has a seisin in law, but only a right of entry. The distinction between a right of entry and a seisin in law is, that a right of entry implies *ex vi termini* that the actual seisin is (wrongfully) in somebody else, while a seisin in law implies that there is no actual seisin in anybody. But an actual entry, which would suffice to turn a seisin in law into a seisin in deed, is also sufficient to turn a right of entry into a seisin in deed.

Seisin in law prevents abeyance of the freehold.

The existence of a seisin in law is sufficient to prevent the seisin, or immediate freehold, from being vacant. This is evident from the fact, that the creation of successive estates necessarily contemplates the existence of a seisin in law only, upon the determination of the particular estate in possession. For if a seisin in law were insufficient to prevent an abeyance of the immediate freehold, all creation of successive estates would, for that reason, be void by the common law. (*Vide supra*, p. 78.)

How seisin in deed is acquired.

A seisin in law is converted into a seisin in deed by making an actual entry, or entry in deed, upon the lands, such entry

being expressed to be made with that intent and in that behalf. Such an entry made upon any part of the lands will give seisin in deed of all lands situate in the same county of which the person making the entry has seisin in law. An actual entry is made so soon as the person desiring to make an entry has any part of his body upon the lands; and such entry is complete and effectual, even though he should immediately afterwards be dragged off by force. (Watk. Desc. 61; who cites the well-known decision in such a case, when actual entry had been made by getting half-through a window:—*Et pur ceo qu'il ne purra entrer per le huis, il entra per le fenestre, et quant l'un moitie de son corps fuit deins la meason et l'auter de hors, il fuit treit hors; per q. il port cest assise;* for which seisin in deed was necessary, see Booth, Real Actions, 284; *et fuit agarde q. le pl' recovera.* 8 Ass. pl. 25, f. 17, b.) If the person entitled be hindered from making an actual entry by fear of violence, he may make an *entry in law* by approaching as near as he safely may, and there making his claim; which under such circumstances will take effect as an actual entry. (Watk. Desc. 62.) Proof must be given that an entry in deed could not safely be made. (Booth, *ubi supra*:—"If one dare not enter, but approach *and is disturbed*, this is sufficient seisin; 11 Ass. 11.")

Incorporeal hereditaments.

Seisin in deed of incorporeal hereditaments, as a rent-charge, or an advowson in gross, could be obtained only by exercising some appropriate act of ownership, as receiving the rent or presenting to the church; and if, by reason of the death of the heir before the rent became due, or before the church became vacant, seisin in deed could not be obtained, this impossibility did not supply the want of seisin in deed, and the heir failed to become the root of descent. (Co. Litt. 15 b.) But seisin in deed of a manor is also seisin in deed of an advowson appendant or appurtenant thereto. (*Ibid.* note 1.) As to seisin in deed of remainders and reversions, *vide supra*, p. 181.

Effect of the existence of a chattel interest.

When the lands are in the possession, or rather, the occupation, of a tenant for years, or from year to year, entry is not necessary in order to convert a seisin in law into a seisin in deed, or actual seisin. In such a case, seisin in deed is *ipso*

facto acquired by the heir immediately upon a descent cast. (*Bushby* v. *Dixon*, 3 B. & C. 298, and authorities there cited.) In *De Grey* v. *Richardson*, 3 Atk. 469, Lord Hardwicke seems, *obiter*, to have confused the reversion upon a lease for years with the reversion upon a lease for lives; of which only the latter, not the former, needed receipt of rent in order to give a seisin in deed. (*Doe* v. *Keen*, 7 T. R. 386, at p. 390; *Doe* v. *Whichelo*, 8 T. R. 211, at p. 213.) The remark above made, as to the effect of the occupation of a tenant for years, applies also to the occupation of other persons having chattel interests. (Watk. Desc. 65, and authorities cited in note *g*.) Of these, tenant by *elegit* is the only one occurring in modern practice.

Some distinctions noted.

A seisin in law suffices, at common law, to make the estate assets in the hands of the heir, to answer the ancestor's bond specifying the heirs. (Watk. Desc. 55.) Seisin in deed during the coverture is still necessary in order to entitle a husband to curtesy in his wife's lands; but seisin in law during the coverture was always sufficient to entitle the wife to dower out of her husband's lands. (*Vide infra*, p. 279.) This distinction was due to the fact that the husband had power at any time during the coverture to turn his wife's seisin in law (which was also his own seisin) into a seisin in deed by his own sole act; so that if he had lost his curtesy for want of seisin in deed, the loss would have been due to his own laches; while the wife, being disabled at common law by her coverture, had no corresponding power to convert her husband's seisin in law into a seisin in deed.

The Rules of Descent.

In stating the following rules, such parts of the common law rules as have been superseded by statute are printed in italics; and the existing law is stated in a supplementary rule where it requires separate statement.

These rules will suffice for ascertaining the line of descent in all ordinary cases, whether at common law or under the recent statutes, 3 & 4 Will. 4, c. 106, and 22 & 23 Vict. c. 35, ss. 19, 20.

RULE 1.—*By the common law the descent of hereditaments is traced from the person who, under the title in fee simple, last obtained seisin in deed thereof.* (Co. Litt. 11 b.) The common law rule as to root of descent.

This rule is often summarized by the maxim, *Seisina facit stipitem*, and the person referred to is styled the stock of descent, or, more properly, the root of descent.

This rule is repealed, or superseded, by the Descent Act, s. 2, which, as explained by the interpretation clause, substitutes for it the following rule with respect to all descents cast on and after 1st January, 1834:— 3 & 4 Will. 4, c. 106.

RULE 1A.—In every case descent shall be traced from the purchaser, that is, the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or enclosure, by the effect of which the land shall have become part of, or descendible in the same manner as, other land acquired by descent. Existing rule as to root of descent.

The purchaser is, therefore, now the root of descent, and the maxim should now be, *Perquisitio facit stipitem.*

The last person entitled, who cannot be proved to have come in by descent, is to be deemed to be the purchaser for the purposes of the Act. (Sect. 2.)

The following points in which the law has been changed or ascertained, are very important, in view of the fact that the purchaser is now the root of descent.

By the common law, if any estate had been limited, whether by devise or by assurance *inter vivos*, to the person who, if no such limitation had been made, would have taken the same estate, and in the same manner, as heir by descent, then such person took the estate by descent and not by purchase; and he could not elect in which way to take it. (Watk. Desc. 270—272.) But now by virtue of the Descent Act, s. 3, under any such devise, if the testator has died after 31st December, 1833, or under any such limitation in an assurance *inter vivos* executed after that date, the heir will, for the purposes of the subsequent descent, be considered to take by purchase. Heir now may take as purchaser by name.

Also under a limitation to heirs as purchasers.

It is uncertain whether, by the common law, the person who first came to any estate of inheritance under a limitation to the heirs, *eo nomine*, of a specified person, would take as purchaser for the purposes of the subsequent descent; though it is, perhaps, the better opinion that he would. By virtue of the Descent Act, s. 4, under any such limitation to the heirs, or heirs of the body, contained in an assurance executed after 31st December, 1833, or under any limitation having the same effect, contained in the will of a testator dying after that date, the person specified as the ancestor will be deemed the purchaser for such purposes.

Land includes all hereditaments.

The word land, by virtue of the interpretation clause of the Act, includes all hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-english, or any other custom.

Special customs of descent are still applicable.

But the provisions of the Act, though they apply to customary lands, contain nothing to interfere with the custom of gavelkind, so far as it relates to equal partition, or to interfere with the custom of borough-english, so far as it consists in a preference of the youngest son before the elder sons, or with other special customs, so far as they relate only to partition, or to a preference for this or that member of a class. These points are foreign to the alterations introduced by the Act, the most important of which may be summed up as follows:—

Summary of the Act's chief provisions.

1. The purchaser is the root of descent. (Sect. 2.)
2. The heir, when devisee or grantee, takes by purchase and not by descent. (Sect. 3.)
3. The heir, taking by purchase in a limitation to heirs *eo nomine*, is not a purchaser for the purpose of making a new root of descent. (Sect. 4.)

 This was a moot point at common law.
4. Brothers trace descent through their parent, instead of inheriting immediately one to another. (Sect. 5.)
5. Lineal ancestors may take in preference to collaterals who trace descent through them. (Sect. 6.)

6. Kinsmen of the half blood may inherit. (Sect. 9.)
7. Descent may be traced through an attainted person who has died before the descent. (Sect. 10.)

This provision was subsequently rendered superfluous by the abolition of corruption of blood by 33 & 34 Vict. c. 23, s. 1. The provision was necessary at the time of the passing of the Descent Act, in order to prevent the change in the law thereby effected, whereby brothers now trace the descent mediately through their father, instead of inheriting immediately one to another, from aggravating the hardship of the law of attainder.

The doctrine of *possessio fratris*.

Under the common law rule, that seisin in deed makes the root of descent, taken in connection with the other rule (Rule 6, *infra*) which forbade collaterals of the half blood to inherit, it followed that, if a brother had taken as heir by descent, and had acquired seisin in deed, his sister (if any) of the whole blood would, on his death intestate and without issue, have inherited as heir to him, to the complete exclusion of his and her brothers (if any) of the half blood. (Litt. sect. 8.) This result of an actual seisin obtained by a brother, is often referred to as the doctrine of *possessio fratris*.

The doctrine applied in equity.

The doctrine of *possessio fratris* applied to the descent of all hereditaments, whether legal or merely equitable, of which a seisin in deed, or such a possession as in equity was equivalent thereto, could be had. (Watk. Desc. 106, 107.)

Not favoured, and now inapplicable.

But the doctrine was not favoured; and the claim of the brother to have obtained seisin in deed was weighed very rigorously. (Watk. Desc. 75.) A seisin which was a good foundation for a writ of right did not necessarily suffice to support a *possessio fratris*. (Co. Litt. 281 a.) Now that descent is always traced from a specified root of descent, the mere acquisition of a *possessio fratris* cannot have any practical influence upon the course of descent.

Effect of dower, and curtesy, on *possessio fratris*.

The seisin of a widow, to whom land had been assigned as dower, and by that express title, was a continuation of the seisin of her deceased husband. The heir, therefore, could not, by entry, obtain seisin in deed of such land, so long as it remained in dower; and even though he had entered into the whole lands

before assignment of dower, yet the assignment, when made, would have defeated his seisin acquired by the entry. Therefore, there could be no *possessio fratris* of land actually in dower, unless the very unusual step had been taken, of granting an estate for life, or in tail, to take effect out of the heir's estate; and under ordinary circumstances, the two-thirds retained by the heir might, on his death, pass to his sister of the whole blood, while the one-third assigned as dower, on the death of the dowress, passed to the younger brother of the half blood, as being the heir to their common father, the person who had last had seisin in deed of that one-third. (Watk. Desc. 84, 85.) The acquisition of a seisin in deed, sufficient to change the course of descent, by a remainderman or reversioner, was practically so rare, that Watkins, in the last-cited passage, seems to imply that it could not happen at all; but, as above mentioned, he has elsewhere admitted the possibility of such an acquisition. (Watk. Desc. 108; *vide supra*, p. 181.) In cases where a tenancy by the curtesy existed, since the sole actual seisin was vested in the husband immediately, without any interval or any need for entry, on the death of the wife, there was a similar obstacle in the way of any *possessio fratris* during the curtesy. (Watk. Desc. 104.)

Escheat.

By an escheat of freeholds the lands are united to the seignory, and by an escheat of copyholds the lands are united to the freehold vested in the lord of the manor. Thereafter the descent of such lands (while they remain in the hands of the lord) is at common law merged in the descent of the manor; and this rule is not affected by the Descent Act, though its provisions affect the descent of the manor in which the descent of the escheated lands is merged.

RULE 2.—By the common law, hereditaments descend lineally to the issue of the root of descent *in infinitum, but they could never lineally ascend.* (Litt. sect. 3.) *For defect of such issue, they descend to his collateral relations, being of the blood of the first purchaser.* (2 Bl. Com. 220.)

So far as this rule forbids ascent in heirship, it is altered by

the Descent Act, s. 6. So far as it prescribes that the collateral heir, in order to inherit, must be of the blood of the first purchaser (Co. Litt. 12 a.), the rule has been rendered superfluous by the substitution of the purchaser for the person last seised as the root of descent. The common law rule has also been altered by the admission of the blood of the person last entitled to the land, upon a total failure of heirs of the purchaser, by 22 & 23 Vict. c. 35, s. 19. See Rule 9, *infra*. The admission of ancestors to inherit renders appropriate the enactment, by sect. 5, that brothers and sisters shall not inherit immediately one to another, but mediately through their parent.

The existing rule may be stated as follows:—

RULE 2A.—Hereditaments descend lineally to the issue of the root of descent *in infinitum*. But for defect of such issue, the nearest lineal ancestor shall be heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such ancestor, or in consequence of there being no descendant of such ancestor; so that a father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue. (Sect. 6.) And every descent from a brother or sister shall be traced through the parent. (Sect. 5.)

RULE 3.—The male issue shall be admitted before the female. (2 Bl. Com. 212.)

RULE 4.—Where there are two or more males in equal degree, the eldest only shall inherit; but two or more females in equal degree shall inherit all together. (2 Bl. Com. 214.)

RULE 5.—The lineal descendants, *in infinitum*, of any person deceased represent their ancestor; that is, stand in the place, in the line of descent, in which the deceased person would have stood if he had been

living. (2 Bl. Com. 216.) Such representatives take, *inter se*, in the order, and in the manner, prescribed by the rules regulating descent among lineal issue.

Therefore there is never any contest between (for example) several males coming of different stocks, but standing all in the same degree of consanguinity to the root of descent; because the eldest stock excludes all the others, as representing the original ancestor with whom the stock commences; who, if he had been living would have excluded all the respective ancestors of the younger stocks.

RULE 6.—*By the common law, the collateral heir, in order to take by descent, must be the next collateral kinsman of the whole blood.* (Litt. sect. 6; 2 Bl. Com. 224.)

Hence sprang the whole doctrine of *possessio fratris*, which has already been discussed under Rule 1.

It is evident that questions of the whole blood and the half blood can only arise in respect to collateral heirs. A man cannot be of the half blood to his ancestor. This is the reason why there was no *possessio fratris* of an estate tail: the descent of the estate being always, under the statute *De Donis*, traced from the donee, the issue in tail taking as heir to him *per formam doni*, and not as heir to the last actual tenant in tail. (*Doe* v. *Whichelo*, 8 T. R. 211.)

Sect. 9 of the Descent Act has substituted the following rule:—

RULE 6 A.—A kinsman of the root of descent by the half blood is entitled to inherit next after the kinsman in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor, where such ancestor is a female; so that the brother of the half blood on the part of the father will inherit next after the sisters of the whole blood on the part of the father, and their issue; and the brother of the half blood on the part of the mother will inherit next after the mother.

Though the substitution of the purchaser for the person last seised as the root of descent, deprived the doctrine of *possessio fratris* of its practical importance, the rule admitting the half blood is by no means nugatory. It was necessary in order to admit the half blood of the purchaser, though it is superfluous so far as regards the half blood of the person last seised when he is not the purchaser.

RULE 7.—*In collateral inheritances the male stocks are preferred to the female; that is, kindred derived from the blood of the male ancestors shall be admitted before those of the blood of the female: except in cases where the lands have in fact descended from a female.* (2 Bl. Com. 234.)

This rule has partly been deprived of its application by the rule which makes the purchaser now the root of descent, because that rule makes it now superfluous to inquire whether the person last seised came to the lands by inheritance through the father or through the mother; and by hypothesis such a question can have no meaning in relation to a purchaser.

So far as the preference of male stocks is concerned, though this preference is still continued, the above statement is not appropriate, because the modern rules of descent admit ancestors among the possible heirs, while the common law rules took account of them only as being persons whose descendants might inherit.

RULE 7A.—In tracing descent to and through ancestors, whether for the purpose of ascertaining which ancestor is the heir, or of ascertaining which ancestor's descendants stand next in the order of succession, every prior male stock must always be exhausted before recourse is had to any subsequent female stock. Thus:—

(1) Paternal ancestors, and their descendants, must be exhausted before any maternal ancestor, or her descendants, can inherit;
(2) Male paternal ancestors, and their descendants, must be exhausted before any female paternal ancestor, or her descendants, can inherit; and

(3) Male maternal ancestors, and their descendants, must be exhausted before any female maternal ancestor, or her descendants, can inherit. (Sect. 7.)

It is conceived that this rule accurately states the effect of sect. 7 of the Descent Act. It does not alter the previous rule of the common law, so far as its preference of male stocks over female stocks is concerned.

The blood of the mother therefore comes next after a total failure of the blood of the father.

The same rule applies, in tracing descents through a female, when recourse to a female stock has become necessary.

When recourse to a female stock becomes necessary, the next following rule shows how this must be done, and in what order the different female stocks, when a choice between them becomes necessary, must be taken.

RULE 8.—When the descent can no longer be traced along the male paternal line, the mother of a more remote paternal ancestor and her descendants are preferred to the mother of a less remote paternal ancestor and her descendants. (Sect. 8.)

When the tracing of the descent has entered upon the female line, the same rule applies, so often as it becomes necessary to change from male ancestors to female. (*Ibid.*)

This rule declares the law, which had once been much in controversy, in accordance with the opinion expressed by Blackstone, 2 Bl. Com. 237, 238. For an account of the controversy and an acute vindication of Blackstone's view, see Watk. Desc. 171—198.

Example of the operation of the last two rules.

The import of the last two rules may thus be illustrated by an example. Suppose that in tracing the male paternal line we can get no further than the grandfather, then the great-grandmother who was mother of that grandfather, and her descendants, will come next in the succession, being preferred to the grandmother, as being the mother of the more remote paternal

ancestor. Suppose the line of that ancestress to be then entered upon, and that no descendants can be traced: it will be necessary to have recourse to her ancestors, beginning with the male paternal stock, that is, the line through which the surname which was her maiden name descended. Suppose that, in this line, we can get no higher than her father, and that he has left no descendants. Thereupon it becomes necessary to have recourse to a female stock, the male stock failing. Thereupon the mother of the said father, that is, the paternal grandmother of the said ancestress, will be preferred to her mother, because, in accordance with Rule 7A, the male stock of the said ancestress must be exhausted before recourse is had to any female stock.

The following rule is due to 22 & 23 Vict. c. 35, s. 19, and is entirely novel:—

RULE 9.—If there should be a total failure of heirs of the purchaser, the descent will thenceforth be traced from the person last entitled to the land, as if he had been the purchaser.

The same rule applies, where land is descendible as if an ancestor had been the purchaser, upon a total failure of heirs of such ancestor.

The effect of this rule is to prevent escheat, unless there is a total failure of heirs, both of the last purchaser and also of the person last entitled. And since the heir of the person last entitled might be his heir *ex parte maternâ*, who would not be of the blood of the purchaser, unless the purchaser was the person last entitled, it follows that this rule may admit into the line of descent whole classes of persons who were excluded by the common law.

Exemplification of the successive steps in tracing a descent.

The following list of steps to be successively followed in tracing a descent may, perhaps, be found useful in illustration of the above-stated rules:—

1. The purchaser's sons, if any, one after another in order of seniority; with their respective descendants in order; the descendants of an elder son always excluding the descendants of younger sons, and among such descen-

dants, an eldest son always excluding all the other children.

2. If no sons, or descendants of sons, the daughters all together as coparceners.
3. If no descendants, the father of the purchaser.
4. The descendants of the father, subject to similar rules, as to primogeniture and coparceny, as if we were tracing the descendants of the purchaser himself. Thus the paternal uncles in order, and their respective descendants in order, come next to the father; and if no such uncles or descendants, the paternal aunts all together as coparceners.
5. If no such descendants, the paternal grandfather; then his descendants, subject to same rules as to primogeniture and coparceny.
6. If no such descendants, the paternal great-grandfather; and then his descendants in like manner.
7. On arriving at the highest ancestor of the male paternal line (through which the surname descends) that can be traced, the next heir is the mother of such ancestor; and then her descendants.
8. The father of such mother, and his descendants.
9. The father of such father, and his descendants.
10. On coming to the highest ancestor of the male paternal line of the ancestress, referred to in No. 7 as "the mother of such ancestor," that can be traced, and on failure of his descendants, we pass to his mother and her descendants, similarly to the passage made in No. 7, and then to the father of such mother and his descendants, similarly to the passage made in No. 8; and so on till we can trace no further.
11. Upon exhausting the blood of the ancestress referred to in No. 7, we then have recourse to the stock of the *next less remote ancestress* in the male paternal line; that is, if the former ancestress was a great-grandmother, we next proceed to the stock of the grandmother. The method by which the descent is traced in this stock is of course exactly like the method by which it was traced in the former one.

12. By degrees, the whole paternal blood of the purchaser being exhausted, we proceed to the maternal blood of the purchaser, and continue our researches, by similar methods, until that is exhausted in like manner.

Here an escheat would have taken place, before the passing of 22 & 23 Vict. c. 35, s. 19. But now, by virtue of that enactment (see Rule 9) we begin again upon—

13. The person who was last entitled to the land; supposing, of course, that he is not the purchaser himself; or, in other words, supposing that there has been a descent cast since the last purchase. The process then begins over again; but, in proportion to the nearness of the relationship subsisting between the person last entitled and the purchaser, a greater or less portion of the tracing will have already been accomplished. For example, if the person last entitled was a son of the purchaser, then, since we have already completely exhausted his paternal blood in our former tracing of the descent through the purchaser himself, we may go straight to the maternal line of the person last entitled.

14. The rule admitting kinsmen of the half blood may thus be illustrated:—

Only persons *related to the root of descent* by the half blood are inheritable. Therefore the issue by the second marriage of a person who is not a blood relation, but is placed in the pedigree only by reason of his or her marriage with a person who is a blood relation, are altogether excluded. This remark, of course, applies only to collaterals standing in the pedigree, not to ancestors; because all ancestors are blood relations.

Then consider the case of any pair of ancestors,—say the paternal grandfather and grandmother,—who are, of course, both of the whole blood to their descendant. In admitting their issue, we must admit first the issue of both of them, or their issue of the whole blood. But the issue of either of them, by a second marriage, will also be admissible; though at very different stages of the descent. Issue by a second marriage of the grandfather, he being a male, will come in next after the issue

of the whole blood. But issue by a second marriage of the grandmother, she being a female, must wait until after the grandmother herself has been reached; which will not generally occur until a much later stage.

When we descend to issue more remote than sons, the question of half blood does not arise. It is indifferent by what wife the son of a grandfather leaves issue; and the issue by the second marriage of such a wife are altogether excluded, as being strangers to the pedigree,—unless such wife should chance to be her former husband's cousin by blood, in which case she will come into her own proper place in the pedigree, as such cousin, and her issue by a second marriage will claim through her in her proper place, as being a blood relation, not as being the wife of her former husband.

The labour of constructing the present chapter has been the most arduous part of the present work. The writer submits the result of his efforts, not without diffidence, to the candid consideration of his readers.

CHAPTER XVII.

DETERMINABLE FEES.

MODIFIED fees differ from a fee simple in their limitation, which is to the *grantee and his heirs*, not simply, but subject to some *qualification of a kind permitted by the law*, which gives to the inheritance a more restricted character. In the case of base fees, the restriction is implied in the circumstances of their origin; but in the case of other modified fees, it is expressed in their limitation.

Such lawful qualification may be of three kinds:—(1) The succession of the heirs, instead of enduring for ever, may be liable to be cut short by the happening of a *future event*, which limitation gives rise to a *determinable fee;* (2) the heirs to whom the inheritance can descend may be restricted to the *heirs of the body* of a specified person (or persons), which limitation gives rise to a *conditional fee* at common law, and to a *fee tail* under the statute *De Donis;* (3) the heirs to whom the inheritance can descend may be restricted to a particular *class*, where the word *class* is to be taken in a peculiar sense, to be hereafter explained, which limitation gives rise to the peculiar estate in these pages styled a *qualified fee simple.*

The mode of their limitation.

In the limitation of a determinable fee, the limitation is expressed to be made to the grantee and his heirs *until the happening of some future event*, which must be of such a kind *that it may by possibility never happen at all.* For it is an essential characteristic of all fees, that they may by possibility endure for ever. (1 Prest. Est. 479.) A limitation to a grantee and his heirs until the happening of some event, which must in the nature of things happen sooner or later, passes no fee. If the happening of the event, though certain, is not fixed in point of time—that is, if it depends upon the dropping of a life or lives —the limitation, as will hereafter be seen, gives rise to an estate

pur autre vie. If the happening of the event is fixed in point of time, the limitation gives rise to a term of years, which, notwithstanding the naming of the heir, passes to the executor on the death of the tenant. (Litt. sect. 740.) Similarly, a limitation to a grantee and his heirs at the will of the grantor, will pass only a tenancy at will. (Litt. sect. 82.)

The language by which the future event is introduced into the limitation of a determinable fee may take either of the two following shapes: (1) *until a specified contingency shall happen*, which may by possibility never happen; or (2) *so long as an existing state of things shall endure*, which is such that it may by possibility endure for ever.

No particular phraseology is necessary to introduce the future event: *until, till, so long as, whilst*, or any other equivalent words may be used, provided that they clearly express the dependency of the duration of the estate upon the future event. ("*Quamdiu, dummodo, dum, quousque, si*, and such like." Shep. T. 125. "*Quamdiu, dummodo, dum, quousque, durante*, &c." 10 Rep. 41.) This proposition will best be illustrated by an examination of the various forms specified in the list given at p. 201, *infra*.

The happening of the future event *ipso facto* determines the estate without any entry or claim by the person entitled to the possibility of reverter.

Remarks upon determinable limitations in general.

This kind of limitation, where words of express limitation are used to mark out an estate, which is by subsequent words (being part of the limitation itself) made liable to determine upon the happening of a wholly disconnected future event, may conveniently be styled a *determinable limitation*. Preston sometimes uses the phrase *collateral limitation* in this sense. His definitions of a *direct*, and of a *collateral* (or determinable) limitation, will repay careful attention:—

> "A *direct* limitation marks the duration of estate by the life of a person, by the continuance of heirs, by a space of precise and measured time: making the death of the person in the first example, the continuance of heirs in the second example, and the length of the given space in the third example, the boundary of the estate or the period of duration.

"A *collateral* limitation, at the same time that it gives an interest which may [by possibility] have continuance for one of the times [marked out] in a direct limitation, may, on [the happening of] some event which it describes, put an end to the right of enjoyment *during the continuance of that time.*" (1 Prest. Est. 42.)

A determinable or collateral limitation is not confined to the limitation of determinable fees. Any estate, including an estate for life, and a term of years, may be made liable to determine in like manner. In the latter cases, the future event which is to determine the estate, is not necessarily an event which by possibility may never happen at all; which rule, as to fees, arises only from the necessity that the collateral clause shall not be simply incompatible with the direct clause, but shall admit, by possibility, of the endurance of the estate limited in the direct clause to its full extent. When such a collateral clause is annexed to the limitation of any other fee than a fee simple, as, for example, to a fee tail (to A. and the *heirs of his body*, being lords of the manor of Dale), it is, of course, equally necessary that the determining event may be such as by possibility may never happen.*

Littleton styles such limitations *conditions in law.* (Litt. sect. 380. See also, Plowd. 242.) They are not unfrequently styled *conditional limitations;* but this last phrase is commonly used in so many different senses, that to make use of it at all is only to invite obscurity and confusion.

How convertible into a fee simple.

Determinable fees are divisible into two classes, according as the future event which may determine them—(1) is an event

* Thus it becomes possible to suggest a more elaborate sub-division of fees than that used in the text, as follows:—

1. Fee simple,	given rise also, by means of a collateral clause, to	5. Fee simple determinable,
2. Conditional fee,		6. Conditional fee determinable,
3. Qualified fee simple,		7. Qualified fee simple determinable,
4. Fee tail,		8. Fee tail determinable,

and 9. Base fees, which may at the present day take any shape in which a fee can be limited. (*Vide infra*, p. 271.) But though there is no reason to doubt the validity of any of these determinable limitations of different kinds of fees, the only one of them which has any practical interest or importance is that above styled *par excellence* a determinable fee. See, however, p. 203, No. 11, *infra*.

which admits of *becoming impossible to happen;* such as the marriage of C. D., which may become impossible by C. D.'s death; or (2) is an event which must *for ever*, if it does not actually happen, remain *liable to happen;* such as the fall of a particular building. In the former case, if the event has not happened before the death of C. D., the determinable fee is by his death *ipso facto* enlarged into a fee simple. In the latter case the determinable fee can never be enlarged into a fee simple, except by a release of the possibility of reverter.

The future event can admit of becoming impossible to happen, only when it is something to be done or suffered by a living person. In such cases the event, if it happens at all, must necessarily happen within the time prescribed by the rule against perpetuities. Therefore determinable fees of this type admit of executory limitations to take effect upon their determination. If any such executory limitation should exist, the determinable fee cannot, pending the possibility of its determination, be enlarged into a fee simple without a release of such executory limitation. This fact has an important practical bearing upon the form of strict settlements. (See p. 202, *infra*, No. 10 of the list there given.)

The following list of determinable or collateral limitations, which have been actually used, or proposed in books of authority to be used, in the limitation of determinable fees, will be found instructive.

These limitations are partly limitations at common law, and partly limitations by way of use and by way of devise. But in all limitations contained in a deed, however they may take effect, the words "and his heirs," and also any valid clause operating by way of determinable or collateral limitation, have, so far as respects the duration of the estate limited, the same operation; and this is true also of devises which contain words of strict limitation.

*Examples of Determinable Fees.**

1. *Peers of the realm.* Preston (1 Prest. Est. 443; *ibid.* 446) expressly lays it down, that *lands* may be limited for a determinable fee under this form. But the passages which he elsewhere (*ibid.* 431, note *e*) cites in support of such limitations (Co. Litt. 27 a; 2 Bl. Com. 109) refer, not to the limitation of the manor of Kingston Lisle to a man and his heirs being peers of the realm, but to the limitation of a *peerage* to a man and his heirs being *lords of the manor of Kingston Lisle.* "By this," says Lord Coke, "he had a fee simple qualified in the dignity;" where by fee simple qualified he means what is above styled a determinable fee. There does not seem to be any objection against such a limitation of lands; because, though the peerage might not be limited to the heirs general, and thus a separation might occur between the heir to the peerage and the heir to the lands, the only result would be, that the fee in the lands would absolutely determine. (See p. 88, Rule 4, *supra.*)
2. *Kings of Scotland.* "King Henry the Third *dedit manerium de Penreth et Sourby Alexandro regi Scotiæ et heredibus suis* regibus Scotiæ." (*Lib. Parl.* Cited by Lord Hale, in note on Co. Litt. 27 a.) In the event, King Alexander died, leaving only daughters, and therefore not leaving any heir who was King of Scotland; whereupon King Edward recovered seisin of the manor. In limitations of this description, if the succession should be once interrupted by default of an heir qualified to succeed, the estate is gone for ever, and will not be re-

* This list is partly founded upon a list given by Preston (1 Prest. Est. 431—433); the references to which are distinguished by a peculiarly complicated inaccuracy. Preston cites among his references the case of *Cocket* v. *Sheldon*, Serj. Moore's Rep. 15, whereby he seems to have admitted into the list, as a true specimen of the limitation now under consideration, the limitation which is given in that case; which, however, did in fact (for want of the word heirs) limit a determinable estate for life. The present writer, following this example, has admitted another like instance. (No. 12.)

For some remarks upon the "special limitation" of the patronage of the hospital of St. Katharine, mentioned by Lord Hale in note 6 on Co. Litt. 27 a, see p. 89, *supra.* This is, at all events, not a determinable fee.

Examples of determinable fees.

vived by the subsequent coming into existence of an heir fulfilling the description in the limitation. (1 Prest. Est. 443, 444.)

3. *Tenants of the Manor of Dale.* (Co. Litt. 27 a; 2 Bl. Com. 109.)
4. *Being lords of a particular manor.* (Wooddeson, Vinerian Lectures, vol. 2, p. 9. To this type also belongs the limitation of the peerage of De Lisle, referred to in Co. Litt. 27 a and 2 Bl. Com. 109.)
5. *As long as such a tree shall grow.* (11 Rep. 49 a; Kitchin, Jurisdictions, 5th ed. p. 301.)
6. *As long as such a tree stands.* (*Idle* v. *Cook*, 1 P. Wms. 70, at p. 75; 2 Ld. Raym. 1144, at p. 1148; Shep. T. 101.)
7. *As long as the Church of St. Paul shall stand.* (Plowd. 557.)
8. *As long as he shall pay 20s. annually to A.* (Plowd. 557.) Here "he" and "A." are loosely used to include their respective heirs. (And see Shep. T. 101.)
9. *So long as B. hath heirs of his body.* (Co. Litt. 18 a; 10 Rep. 97 b; Plowd. 557; Cro. Jac. 593; Finch, Law, p. 112; 10 Vin. Abr. 233 = *Estate*, I. 10, pl. 2; *Idle* v. *Cook*, *ubi supra;* Watk. Desc. 211.) Here B. must not be the same person as the donee. For further observations, see p. 268, *infra.*
10. *Till the marriage of a person shall take place.* (1 Prest. Est. 432; *ibid.* 442.) The authorities cited by Preston (Cro. Jac. 593; 10 Vin. Abr. 233) make no mention of any such limitation; but there is no doubt as to its validity. In strict settlements of real estate, made by a settlor in contemplation of his marriage, the limitations regularly begin with a limitation to the use of the settlor and his heirs *until the solemnization of the intended marriage.* Thereby the settlor takes a determinable fee, which will *ipso facto* become a fee simple if either of the parties to the intended marriage should die before its solemnization.

Since a determinable fee limited in this form must necessarily determine, if at all, within the time prescribed by the rule against perpetuities, it admits of, and it is in practice always followed by, sundry execu-

tory limitations to take effect upon its determination, that is, upon the solemnization of the marriage; and therefore such a determinable fee will not, before the solemnization of the marriage and during the joint lives of the parties, admit of enlargement into a fee simple, except by the release of these executory limitations; and these, being partly in favour of the issue of the marriage, who by hypothesis are not in being, cannot be released. Therefore, in order to prevent the inconvenience which would result during the lives of the parties from the making of the settlement, in case the intended marriage should not be solemnized, it is proper to insert into the settlement a proviso that, in case the marriage shall not be solemnized within a specified time (usually twelve months) after its date, the uses of the settlement shall be void and the lands shall revert to the use of the settlor in fee simple. Examples of determinable fees.

It is not necessary that the marriage should be the marriage of the grantee himself. See Lord Nottingham's observations in *Howard* v. *Duke of Norfolk*, 2 Swanst. 454, at p. 461.

11. *Till C. returns from Rome.* (Fearne, Cont. Rem. 12; and Butler's note at p. 13. See also the observation of Serjeant Maynard, in the *Duke of Norfolk's Case*, 3 Ch. Ca. 1, at p. 46, that a limitation, *To one and his heirs males, till such a one returns from Rome*, is good; which is an example of a determinable fee tail.)
12. *Till A.* [the grantor] *makes I. S.* [a stranger] *bailey of his manor.* (Lord Hale, in Co. Litt. 42 a, note 6.) In the case cited, the limitation was not to the grantee and his heirs, and it therefore passed no fee, but only a determinable estate for life. There is no reason to doubt that the clause would be valid in the limitation of a fee.
13. *Until B.* [the grantee] *go to Rome.* (Shep. T. 125.)
14. *Until he* [the grantee] *be promoted to a benefice.* (*Ibid.*)
15. *Until such time as* [the grantee] *his heirs, executors, or administrators, shall make default in payment of any of the*

Examples of determinable fees.

said sums:—viz., certain instalments each of 20*l.*, one such to become payable at Michaelmas in every year, until the total sum of 800*l.* should have been paid. (1 Leon. 33.) This form occurs in a security taken by the Exchequer in Queen Elizabeth's reign, from a crown debtor. The form next following was a part of the same limitation.

16. *Until* [the Queen] *her heirs and successors shall have received of the issues and profits* [of the lands] *such sums of money, parcel of the said debt, as shall then be behind and unpaid.* (1 Leon. 33.) The ultimate limitation was to the crown debtor in fee simple. The limitations, to the crown upon default in payment of the instalments, and to the debtor upon satisfaction of the debt out of the rents and profits, are of course not remainders, but executory limitations.

17. *Until B.* [the grantee] *pay to A.* [the grantor] 20*l.* (Shep. T. 125.)

18. *Until the feoffor pay* 100*l.* *to* [*the feoffee*] *or his heirs.* (Co. Litt. 248 a; and see 10 Rep. 41 b.)

19. Donec et quousque *I. S. shall pay to the feoffor,* or to his heirs, one thousand pounds.* (Dy. 300 b, pl. 39. Compare *ibid.* 298 b, pl. 30.)

Upon the view taken in equity of such limitations, see *Blagrave* v. *Clunn*, 2 Vern. 576; *Thomasin* v. *Mackworth*, Carter, 75.

20. *For, during, and until any son that the feoffor shall beget of the body of his said wife shall accomplish the age of twenty-one years.* (Dy. 300 b, pl. 39; *Cocket* v. *Sheldon*, Serj. Moore's Rep. 15. See also *Lethieullier* v. *Tracy*, 3 Atk. 774, Ambl. 204; *Spencer* v. *Chase*, 10 Vin. Ab. 203; 9 Mod. 28; Dy. 124 a, pl. 38; where a similar limitation occurred in a will.) The form of the limitation in Dyer and Moore was, To the use of the wife, until, &c.; which

* The word *feoffor* seems in the first-cited passage of Dyer to be twice printed for *feoffee*. The mistake makes no difference to the nature of the limitation. In Dy. 298 b, pl. 30, the words are, "until such time as the said feoffor should pay to the feoffee or his heirs one hundred pounds."

Examples of determinable fees.

only gave her a determinable estate for her own life. Had it been, To the use of the wife *and her heirs*, until, &c., she would have taken a determinable fee.

21. *That they*, or the survivor of them, or the heirs of the survivor, *should*, out of the lands by the rents, issues and profits, or by the sale of the whole or so much as should be necessary, *raise so much as should be sufficient for the payment of debts, legacies, and funeral expenses;* and then, &c. (*Bagshaw* v. *Spencer*, 1 Ves. sen. 142. This devise gave a legal fee to the devisees; *per* Lord Hardwicke, at p. 144.)

22. *In trust* to pay his sister E. W. an annuity of 100*l. till his debts and legacies were paid;* and after, &c. (*Wellington* v. *Wellington*, 1 W. Bl. 645. The estate of the trustees is styled a "base fee, determinable on the payment of the testator's debts and legacies out of the profits of the estate;" see p. 647. And see *Murthwaite* v. *Jenkinson*, 2 B. & C. 357.)

23. *In trust, till the rents and profits of* [the lands] *shall raise and pay the several legacies and bequests* mentioned in the testator's will. (*Shields* v. *Atkins*, 3 Atk. 560.)

24. To the use of certain persons *until they made a good and sufficient lease* [of the lands] *by indenture for a term of forty years.* (*Lusher* v. *Banbong*, Dy. 290 a.)

25. William, Earl of Bath, in 6 Jac. levies a fine with proclamations, and "declares the uses of this fine to William, Earl of Bath, and to his heirs, *until he otherwise should or did dispose of the same.*" (*Earl of Bath's Case*, Carter, 96. See also *Clere's Case*, 6 Rep. 17.) If this limitation had occurred in an assurance made at the common law instead of under the Statute of Uses, it is conceived that the addition of the words in italics would have had no more effect than the common, but superfluous and nugatory, addition of the words, *and assigns*, to a limitation in fee simple.

26. "One devised land in London to the prior and convent of B. *ita quod reddant annuatim decano et capitulo Sancti Pauli* 14 marks; and if they fail of payment, that their estate

shall cease, and that the said dean and chapter and their successors shall have it." (1 Eq. Ca. Ab. 186, pl. 3.) The gift over was held to be void, on the ground that the first devise carried a fee and left nothing to be disposed of; and the above-cited account remarks, that executory devises had not yet been recognized by the Courts. But even if executory devises had then been recognized, this gift over seems clearly to be void for remoteness.

The distinction between determinable limitations and limitations upon condition.

When the future event which if it should happen will determine the estate, is an act to be done by the grantee, or depends upon the will of the grantee, as his marriage, the doing of the act under such circumstances bears a close resemblance to the breach of a condition that the grantee shall not do the act. These cases of determinable limitation are therefore liable to be confused with limitations upon or subject to a condition, giving a right of entry upon a breach by the grantee; from which they nevertheless differ very widely. (1) In the limitation of a determinable fee, the doing by the grantee of the act which is to determine the estate, is made a part of the limitation itself, and the doing of the act will *ipso facto* determine the estate without any entry or claim on the part of the person entitled to the possibility of reverter. (Plowd. 242.) But where an estate is limited in fee simple, and the limitation contains no qualification, but, externally to the limitation, though in the same deed, or in another deed delivered at the same time, is contained a condition by a breach of which the fee simple is liable to be defeated: a breach does not *ipso facto* avoid the estate, but only makes it liable to be avoided by the entry of the person entitled to the possibility of reverter. No estate of freehold can be made to cease, without entry, upon the breach of a condition. (Co. Litt. 214 b.) (2) Conditions which are annexed to or are in defeasance of a fee simple, are subject to the common law, and are governed by the learning of common law conditions; because the statutes by which the common law learning applicable to conditions annexed to estates has been modified, are restricted to conditions annexed to estates which are less than a fee. (See

32 Hen. 8, c. 34, s. 1; 22 & 23 Vict. c. 35, s. 3; the Conveyancing Act of 1881, ss. 10, 12.)

The rule against perpetuities forms no part of the common law; and the opinion which has been held by some text writers, that such conditions are within the rule, does not seem to be well founded. (*Vide supra*, p. 152.)

A modern doubt.

In *Re Machu*, 21 Ch. D. 838, the question seems to have been thought not entirely free from doubt, whether a determinable fee could be limited to A. and his heirs *until A. shall be declared a bankrupt*. The learned judge expressly declined to give an opinion upon the question; and at p. 843, he seems not to have distinguished the particular question of this particular limitation, from the general question "whether an estate in fee simple can be subject to a conditional limitation, or not;" by which he seems to have meant, whether the limitation of a determinable fee is valid. He did not advert to the circumstance, that in all strict settlements of real estate the validity of such limitations is assumed. The authorities above cited seem to be sufficient to remove all doubt as to their validity.

The limitation in *Re Machu*, upon which the discussion arose, was held to be a limitation subject to a condition, and not a conditional (or determinable) limitation; and the condition, being in absolute restraint of the alienation of a fee simple, was held to be void, as being repugnant to the nature of the estate.

Alienation of determinable fees.

All modified fees confer upon the tenant the same absolute right of user, and to commit unrestrained and unlimited waste, as a fee simple. They do not necessarily confer the same right of alienation and devise.

The power of the tenant of a determinable fee to alienate or devise cannot, properly speaking, be said to be in any way restricted; but his alienation will not create a greater estate than he himself has. He may aliene at pleasure, and the assign or devisee takes a like estate of inheritance, determinable upon the happening of the event which would have determined it in the hands of the donee or his heirs.

There seems to be nothing in the Settled Land Act, 1882, to modify in any way the right of alienation incident at common law to the estate of the tenant of a determinable fee. It is not improbable that, in sect. 58, sub-s. (1), (vi), of that Act, the words "conditional limitation" mean a determinable limitation at common law, such as has formed the subject of this chapter; but those words are there expressly confined to determinable limitations of estates for life, estates *pur autre vie*, and terms of years "determinable on life."

CHAPTER XVIII.

CONDITIONAL FEES.

THE law relating to conditional fees which can now subsist only in hereditaments other than tenements, and (by analogy) in copyholds of manors in which there is no custom of entail, is a very obscure subject of research. The most eminent authorities are sometimes at variance, and the living tradition of modern practice is almost entirely wanting. But of the questions which have been raised some, even before the statute *De Donis*, were probably matters of more curiosity than practical importance; and others rather illustrate the difficulty of reconciling the rules governing these estates with general principles, than throw any doubt upon the rules themselves.

Definition, and mode of their limitation.

A conditional fee may be defined *in limine* as a species of *estate limited upon or subject to* (that is, defeasible upon breach of, or to be confirmed, or enlarged, upon performance of) *a condition;* the nature of the estate, and the nature of the condition, being reserved for subsequent remark. But this definition is subject to the observation, that the rules governing these fees rest upon a special basis of their own, and are not in accordance with the general law applicable to estates upon condition.

The conditions admissible for the purpose of creating a conditional fee are restricted to a single type, which always takes the form of a limitation expressed to be to the heirs *of the body* of the donee or donees, either *generally*, or to a *special class* of such heirs. The word heirs limits a fee, or estate of inheritance; while the imposed restriction prevents the fee from being a fee simple in the proper sense of the term. The different forms assumed by this kind of limitation, which require to be noticed as illustrating the law of entail, are as follows:—

(1) To the heirs *of the body;* (2) To the *heirs male* of the body; (3) To the *heirs female* of the body;

(4) To the heirs of the body of the donee *by a particular wife* (or husband): the person designated as wife (or husband) not necessarily being married to the donee at the time of the gift, but being by possibility capable of such marriage; (5) To the *heirs male* of the body of the donee by a particular wife (or husband); (6) To the *heirs female* of the body of the donee by a particular wife (or husband);

(7) To the heirs of the *bodies of two persons* lawfully married, or by possibility capable of lawful marriage, the two persons being both named as donees in the gift; (8) To the *heirs male* of the bodies of two such persons as aforesaid; and (9) To the *heirs female* of the bodies of two such persons as aforesaid.

Nature of heirs special.

The phrase *heir male* imports not only that the heir must be a male, but also that he must be able to deduce his descent solely through males. And similarly of *heir female.* (Litt. sect. 24, and Lord Coke's comment.)

The special heir must be heir of the body.

Any similar restriction to a single sex, if attempted, in a deed or on a feoffment, to be imposed upon the *heirs*, as by limitation to the *heirs male*, is void, and the grantee takes a fee simple. (Litt. sect. 31.) The law arrives at this construction, by rejecting the word *male*, upon the principle, *ut res magis valeat quam pereat.* (Co. Litt. 27 a, b.) And upon the same principle, if gavelkind lands be limited to A. and his eldest heirs, or if common law lands be limited, in a deed or on a feoffment, to A. and the eldest heirs female of his body, the word *eldest* will be rejected, to give effect to the limitation. But in a will, a limitation to A. and his heirs male will create an estate in tail male: the words, "of his body," being supplied by construction of law. (Co. Litt. 27 a; *Baker* v. *Wall*, 1 Ld. Raym. 185.) This is therefore no exception to the rule, that restrictions in point of sex cannot be imposed upon heirs general.

In what sense the limitation is conditional.

The restricted nature of this limitation was, at a period so early as to be almost beyond the reach of history, construed by the courts as being *in the nature of a condition;* and the limitation as being therefore in the nature of a *limitation upon condition.*

And they seem to have regarded the condition as to some extent uniting in itself contradictory characteristics: being partly in the nature of a condition which by its performance would confirm, or enlarge, the estate, and partly in the nature of a condition always remaining liable, by a breach, to defeat the estate. For—

(1°) As soon as an heir of *the prescribed class* was born (*post prolem suscitatam*) this was held to be for some purposes a performance of the condition, so as for some purposes to enlarge the conditional fee into a fee simple; namely, so far as to enable the donee (1) to aliene the lands for an estate of fee simple absolute; (2) to forfeit, including under that word escheat by attainder of felony besides forfeiture for treason; (3) to charge with incumbrances which were as indefeasible as if created by a tenant in fee simple. (Co. Litt. 19 a.) And (4), in the case of a gift either to a donee and his or her issue by a particular wife or husband, or to two donees and their joint issue, birth of the prescribed issue had the effect of enlarging the possible course of descent, so as to make it include issue of the donee, or of the survivor of two donees, by another wife or husband; as will presently be explained more at large.

If the donee of the conditional fee aliened before such issue born, his alienation would bar his own issue, if born afterwards, giving the assign an estate which endured so long as such issue should exist; but such alienation would not bar the donor of his possibility of reverter on failure of such issue. (Co. Litt. 19 a.)

The descent of a conditional fee.

But this fulfilment of the condition, by having issue of the prescribed class, was not an absolute fulfilment once and for all: the estate was not thereby converted into a fee simple for all purposes, and the condition for some purposes still remained on foot; for—

(2°) If the donee, after birth of the prescribed issue, did not aliene, but suffered the estate to descend, it followed the prescribed course of descent, and none but heirs of the prescribed class could take; but these could take to the exclusion of the heir general, in case he (or she) happened not to be of the prescribed class. (Co. Litt. 19 a; and Harg. n. 4 thereon.)

That is to say, the special heir *per formam doni* is not necessarily identical with the heir general. This proposition involves an anomaly, seeing that by this means the course of descent by common law could be diverted into a different channel. For example, if a man should die leaving two sons; and afterwards the elder son should die leaving only a daughter, in this case the daughter is the heir general of the first mentioned person; but the heir male is the younger son, or (after his death) his male issue; and under a limitation to the first mentioned person and the heirs male of his body, the younger son and his male issue would inherit, to the exclusion of the heir general. Similarly, if a man should die leaving a son and a daughter, the son, whether elder or younger than the daughter, is the heir general; but, under a limitation to the first mentioned person and the heirs female of his body, the daughter, whether elder or younger than the son, would inherit; in this case also to the exclusion of the heir general.

This doctrine of descent probably admits of no dispute in regard to conditional fees; and it undoubtedly admits of no dispute so far as fees tail are concerned. (Litt. sects. 21—25.)

The heir (of the prescribed class) coming in by descent, had, whether he had issue or not, exactly the same power or capacity to alienate, forfeit, and charge, as the original donee had after birth of the prescribed issue.

If the succession of the special heirs came to an end without any alienation having been made, the donor's possibility of reverter became an interest in possession.

The possible course of descent is wider for a conditional fee than for a fee tail.

As has been briefly mentioned, a conditional fee limited to the heirs (whether general or special) of the body of a donee by a particular wife or husband, or to the heirs of the bodies of two persons lawfully married, or capable of lawful marriage, had a remarkable characteristic, particularly referred to in the preamble to the statute *De Donis* by which conditional fees were converted into fees tail; namely, that, *after issue of the prescribed kind had been born*, the estate might, in default of such issue, descend to the issue of the donee, or of the survivor of the two donees, by another wife, or husband, as the case might require. That is

to say, the birth of issue of the prescribed class would practically convert what might be styled a gift in *special tail at common law* into a gift in general tail at common law. This proposition is deduced by Lord Coke as a conclusion from the doctrine, (1) that, the survivor being the wife, her second husband, after birth of issue by her, should be tenant by the curtesy (2 Inst. 336; the 4th resolution in *Paine's Case*, 8 Rep. 34, at p. 35 b); and (2) that, the survivor being the husband, his second wife should have dower. (*Ibid.* at p. 36 a.) According to Lord Hale, this peculiar characteristic did not apply to conditional fees created by gift in frankmarriage. (Co. Litt. 19 a, n. 3.) By the statute *De Donis*, conditional fees were deprived of this peculiar quality; and the descent of such conditional fees, which were transmuted by the statute into what are now styled estates in special tail, was thenceforth restricted solely to the issue of the donee or donees.

Certain fees limited upon condition, classed by Preston with conditional fees.

With conditional fees as above defined and discussed, Preston has also classed limitations made to a man *and his heirs generally, if he shall have heirs of his body.* (2 Prest. Est. 292.) In a series of eight elaborately-constructed propositions, in which he defines and sums up the principal characteristics of conditional fees, he carefully provides for the inclusion of limitations of this type. (*Ibid.* 320, 321.)

This usage is not peculiar to Preston; for distinct traces of it may be found in Lord Coke and other authors. He is, however, more systematic and elaborate in his adoption of it, and in his treatment of conditional fees as being only one class of fees limited upon condition. But he expressly lays it down, that conditional fees of this latter type "are governed by the general rules of law, as distinguished from the law applicable to conditional fees properly so denominated." (2 Prest. Est. 292.) From this passage it appears, both that these limitations are more properly styled limitations subject to a condition, and are, in fact, governed by the common-law learning applicable to estates upon condition, and also that Preston fully admitted the difference between them and conditional fees properly so called.

The condition annexed to this kind of limitation, is an express

condition properly so called; and (unlike the quasi-condition supposed to be implied in the limitation of a conditional fee proper) it is fulfilled, once for all, and to all intents and purposes, by birth of the prescribed issue, whereby the estate becomes *ipso facto* a fee simple absolute.

Since these limitations differ so widely from conditional fees properly so called, it does not seem to be expedient to class them together. It is superfluous to say that these limitations do not occur in practice.

CHAPTER XIX.

QUALIFIED FEES SIMPLE.

THERE remains another kind of limitation allowed by the common law, in the nature of an express modification of a fee simple, and giving rise to an estate of inheritance, which, since, in the opinion of Preston, it is undoubtedly valid, requires to be mentioned; and the recent case of *Blake* v. *Hynes*, which is discussed at the end of this chapter, shows that its possible occurrence in practice is a matter which needs to be considered by the conveyancer. It may conveniently be styled a qualified fee simple.

Their nature and mode of limitation.

It clearly appears from Litt. sect. 354, as explained by Lord Coke's comment, that, by the common law, a fee may be expressly limited to a man and the heirs of any ancestor, in the paternal line, whose heir he is. Littleton declares that a limitation must be made in this form, by a feoffee who is seised in fee simple subject to a condition to re-infeoff "many men"—*plusors homes*—jointly in fee simple, in case all of them should die before any feoffment has been made pursuant to the condition. Under such circumstances he lays it down, that the feoffment should be made to the heir of the last survivor, *habendum* to him and *the heirs of the aforesaid survivor*.

The simplest example of this kind of limitation would occur, if the heir of the last survivor should be his son; in which case, by following Littleton's directions, we should arrive at a limitation to a man and his heirs *ex parte paternâ*, so as to exclude altogether from the succession the heirs *ex parte maternâ;* who, if he had taken a fee simple absolute, since he would have taken it by purchase and not by descent, would have been entitled to succeed on a failure of the heirs *ex parte paternâ*.

The fact that, by the common law, a seisin in fee simple, which had been acquired by descent from a father who had

come to the estate by way of purchase, excluded the heirs of the son *ex parte maternâ*, supplies the motive which induced Littleton to prescribe the adoption of this limitation under the above-mentioned circumstances. To state the case more generally, a seisin in fee simple acquired by descent from any ancestor who had come to the estate by purchase, excluded all heirs of the descendant who were not of the blood of the ancestor. The change in the law of descent effected by the Descent Act, 3 & 4 Will. 4, c. 106, s. 2, does not seem to have made any difference, so far as regards the method prescribed by Littleton for attaining the object which he had in view. Under the same circumstances as those supposed by him, it would still be necessary to make the same limitation in order to fulfil the condition which he supposes to have been imposed. The substitution by the Descent Act of the last purchaser as the root of descent, in the place of the person who last had seisin in deed of the lands, confines the inheritable blood to the blood of the last purchaser quite as strictly as the rule of the common law. And though a later enactment, 22 & 23 Vict. c. 35, s. 19, has now introduced a possibility that, under peculiar circumstances, persons *might* inherit who are not of the blood, this contingency contains nothing to affect Littleton's directions. If that contingency should happen, its effect will be precisely the same in whatever way the limitation is made.

There seems to be no sufficient reason to suppose that the Descent Act has in any way affected the validity of these limitations at common law. And it will presently be shown, by what are conceived to be irrefragable arguments, that this statute has expressly provided a new method of limitation, by which precisely such a fee as that described by Littleton can at this day be limited; so that, if the statute has, in this respect, any effect at all, its effects are, at all events, restricted to prescribing a new method of limitation, without affecting the validity of the estate.

The course of the descent.

Here the course of descent does not differ, so long as the estate endures, from the course of descent which would have been taken by a fee simple absolute, upon the hypothesis that it had actually descended from the specified ancestor; but in a

certain sense* it may be said that the *quantum* of the estate differs, the descent being restricted to one class only of the heirs, and the estate determining with the exhaustion of this class. Here the word *class* is used to denote those heirs of the descendant who are also among the heirs of the specified ancestor. Where the descendant is the son, such heirs are frequently classed together as the heirs *ex parte paternâ;* but in the case of more remote descendants, such classes of ancestors less often require to be mentioned, and have not acquired special names. It will appear, however, from some subsequent remarks, that this language about *restriction of the descent to a class of heirs*, is somewhat confusing and misleading. The simplest point of view is to regard one person as being substituted for another as the root of descent. When we say *that the descent is restricted to the heirs ex parte paternâ*, we only mean that the descent is to be traced from the father, subject to the hypothesis that he has had at least one son.

Preston has treated limitations of this kind with considerable detail in the first volume of his Treatise on Estates, pp. 449—475. He makes it quite plain that he intended to mark off this estate into a separate class, not merely to classify it among the other fees usually collected under the terms *qualified fee*, or *qualified or base fee;* which terms, as above mentioned, are commonly used to include all fees, except fees simple (absolute) and conditional fees. He remarks, that a passage of Blackstone, 2 Bl. Com. 222, may seem to throw doubt upon the existence of this species of estate; but expresses the opinion, "That the authority of Littleton, and of Lord Coke, establish in the most decisive manner the certainty of its existence." (1 Prest. Est. 469.) The present writer formerly entertained some suspicion that this peculiar estate owes it existence to Littleton's ingenuity in suggesting a hypothetical case. But the case of *Blake* v. *Hynes* rather suggests the conclusion, that Littleton's observations may have arisen from the tradition of an ingenious device actually

* In the sense, at all events, in which an estate *pur autre vie* is said to be less in *quantum* than the estate of a tenant for his own life. But Preston thought that the distinction in *quantum* was of a much more serious nature. For some remarks upon his doctrine, see p. 223, *infra*.

used to extricate a client from an awkward position, which would at first sight seem to leave open no course by which he could precisely fulfil the condition imposed upon him. From Lord Coke's language it is clear that Littleton's meaning needed interpretation, and had in fact been misunderstood. This shows that the device in question could not have been common.

Distinguished from other fees.

The rare occurrence of this species of estate, if it ever has actually occurred, has prevented it from receiving much notice. The present writer is not aware of any authorities other than those above cited,* who have made it the subject of express discussion; and this remark is meant to be exclusive of Blackstone, as will presently be shown more at large. Though it has no great practical importance, the mode of its limitation is too remarkable to be passed over in silence; and it requires to be separately classed. It differs in a marked manner from a determinable fee,† since it is limited by restriction to a particular class of the heirs, and not by reference to the happening of a future event. It still more evidently differs from a conditional fee, because, so long as it endures, the powers of the tenant are neither enlarged nor abridged by anything in the nature of the performance of a condition. It is manifestly quite distinct from a fee tail, because (among other reasons) the issue had never any claim against the alienation, by whatever assurance it might be effected, of the ancestor; whereas, even at the present day, not all assurances of the ancestor will bar the issue in tail. And it differs from a base fee, as defined in these pages, too obviously for the difference to require particular mention.

* Preston cites Fleta, lib. 3, c. 3, as giving a definition of these fees. (1 Prest. Est. 449, note *g*.) There is, however, nothing about them in that chapter;—a fact which will surprise no one who is familiar with the inaccuracy of the references in Preston's works. Those deeply-learned treatises seem to have been issued from the press uncared for except by the printer's devil. There is probably something about these qualified fees somewhere in Fleta; but the present writer, in the course of a somewhat cursory inspection of what seemed to be the most probable places, has not been able to find any reference to them. An exhaustive search would hardly have repaid the trouble. Fleta's definition, in Preston's version of it, is couched in wide and somewhat vague terms; and it appears to go beyond what is laid down by Littleton and Lord Coke. In so far as Fleta concurs with Littleton and Lord Coke, his authority seems to be superfluous: in so far as he goes beyond them, he does not seem to be entitled to extraordinary veneration.

† Preston, though he thought that, for purposes of alienation, this kind of fee has the quality of a determinable fee, nevertheless recognizes a material difference between them. (1 Prest. Est. 468.)

Supposed objection derived from Blackstone.

The passage of Blackstone above referred to, as seeming to throw doubt upon the validity of qualified fees simple, is in reality foreign to the purpose. Blackstone is endeavouring to account, upon principles of archaic feudalism, for the rule of the common law, that, though heirship under a fee simple was deduced from the *person last seised*, and though heirship, in respect to a fee simple, included collateral heirship, yet no one might inherit who was not *of the blood of the original purchaser*. It is evident that under certain circumstances, this rule might restrict what would have otherwise been the descent, if the rule had merely prescribed that descent should be traced from the person last seised. If a man had acquired a fee simple by purchase, and this had descended upon his son as heir-at-law, and the son had subsequently died intestate, leaving no (known) heir *ex parte paternâ*, then the lands would escheat to the lord sooner than pass to the heirs *ex parte maternâ*. (Litt. sect. 4.) These last-mentioned heirs are among the heirs of the person last seised, but they do not fulfil the other prescribed condition, that they must be of the blood of the first purchaser. Blackstone remarks, that this feature of the law of descent was entirely unknown to the Jews, Greeks and Romans, and that it is almost (he might probably have omitted this last word with perfect safety) peculiar to our own laws and those of a similar original. (2 Bl. Com. 220.)

In endeavouring to account for the above-mentioned rule, Blackstone begins by considering the question of the admission of collateral heirs. He adduces much learning of a highly questionable character; and his doctrine is not perfectly intelligible and consistent with itself. He lays it down that, when feuds first began to be hereditary (and it is difficult to guess within several centuries what epoch is here referred to) no one could inherit except the issue of the purchaser; but that, at some subsequent period, "in process of time, when the feudal rigour was in part abated," it became the custom, in the grant of a feud which was in fact *feudum novum* (by which Blackstone means, a feud acquired by purchase) to express that it should be held *ut feudum antiquum*, that is to say (as Blackstone understands the phrase) with all the qualities which it would have had, if it had in fact descended from the grantee's ancestors.

He supposes that by this device the collateral heirs, of any degree of remoteness, acquired their right of succession; because, even under the strictest rigours of *feudum novum*, after a descent once cast, some collateral heirs of the person last seised were let into the succession; and the longer the descent was continued, the more extensive was the admission of the collateral heirs; so that, if by a feigned supposition it was imported into the original grant to the purchaser, that he should take upon the same terms as if the feud had in fact descended upon him from his ancestors indefinitely, without specifying any one in particular, collateral ancestors of any degree of remoteness might be brought into the succession.

Blackstone sums this up as follows:—"Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum:* unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but every grant of lands in fee-simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite: and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance." (2 Bl. Com. 222.)

There is no need to pursue the further refinements by which the learned author, having accounted after a fashion for the admission of collaterals, proceeds to give some semblance of a reason for the exclusion of all who are not of the blood of the first purchaser. These speculations, though their ingenuity may amuse, would scarcely at the present day be gravely proposed as resting upon a historical basis. And it is evident, that Blackstone had not in his eye any such limitation as is now being considered, and that his remarks, whether well or ill-grounded, contain nothing which is opposed to its validity. The question is not, to adopt Blackstone's phraseology, whether a fee can now (independently of the statute *De Donis*) be limited *ut feudum novum;* but whether, granting that every fee must be limited *ut feudum antiquum*, the precise degree of the antiquity may lawfully be specified. Blackstone's contention, that where no

precise degree is specified, the degree is, for certain purposes, taken to be indefinite, would not prove that the degree may not, for certain purposes, and in a certain sense, be precisely defined.

But the strongest objection against founding any argument against the validity of qualified fees simple upon these remarks, is to be found in the nature of the remarks themselves. Whether it was judicious in a lawyer, when writing a treatise for purposes of practice, to enter upon vague speculations (for which no sufficient materials at that time existed) into the primeval origin of the laws, instead of confining his attention to matters less remote, may be an open question. But there can hardly be any question, that it would be absurd to treat these loose and obscure generalisations, chiefly relating to foreign feudal notions, as indicating the existence of any settled opinion in Blackstone's mind, upon a minute and highly technical point of English real property law. There is nothing to show that Blackstone ever at any time directly entertained in his mind the question of the validity of these limitations. But there seems to be, in the above-cited remarks themselves, abundant evidence that when he was writing them nothing was further from his thoughts than the validity of qualified fees simple. The question is not whether Blackstone has individually pronounced against their validity, about which he was manifestly not thinking at all, but whether his fanciful perquisitions into feudal antiquities, if they seem to make against the validity of qualified fees simple, can rationally be regarded as having any weight for such a purpose. This question seems to answer itself.

Second objection; derived from Lord Coke.

A more serious objection against the validity of these limitations is perhaps to be found in the following passage of Lord Coke:—"If a man giveth lands to a man, to have and to hold to him and his heires on the part of his mother, yet the heires of the part of the father shall inherit, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are voide." (Co. Litt. 13 a.)

This language seems to import that if, in a case resembling that above supposed by Littleton, the persons to whom the re-

feoffment must be made should include a woman, who should happen to be the last survivor and to die leaving a son, then the feoffment could not be made in the prescribed form; since that would imply a limitation to the son, *habendum* to him and his heirs *ex parte maternâ*.

Preston understands Lord Coke in this sense; and expresses the opinion, that in the case last supposed, the limitation should be made to the son and his heirs simply, that is, for a fee simple absolute. (1 Prest. Est. 474, 475.) He remarks that, since in this case the law does not permit the limitation to be made in the special form, no breach of the condition will be incurred by making it in the general form.

But the question does not arise upon the case as it is stated by Littleton. His words are, "upon condition, that the feoffee shall re-infeoff many *men—plusors homes;*" and there is nothing to show that he and Lord Coke did not intend the word to exclude women. The language of Lord Coke seems to imply, throughout his remarks, that he contemplated only cases in which a man is the survivor; and the notice which he takes of the use by Littleton of the word re-feoffment, instead of feoffment simply, shows that he attached weight to the verbal niceties of language.

Preston distinguishes between the case of a man and a woman, regarded as the survivor; and remarks that, "in Littleton's case, the course of descent prescribed by the limitation *does not vary the course of descent prescribed by the general rules of law.* The course is *bounded only*, and *not diverted* or turned out of its proper channel." (1 Prest. Est. 474.)

The meaning of this distinction may be explained as follows: In the limitation of a qualified fee simple two persons are, in different senses, regarded as purchasers, the person to whom the limitation is made and the specified ancestor through whom the descent is to be deduced. If the ancestor is in the male line, the commencement of the descent, according to the terms of the limitation, will not differ from what would have been the commencement of the descent upon the hypothesis that the person to whom the limitation is made is for all purposes the purchaser. But if, in specifying the ancestor, any divergence from the male line were permitted, the commencement of the descent according

to the terms of the limitation would be different from what it would have been if the person to whom the limitation is made had been the purchaser. Thus there would be a discrepancy, or discordance, *at the commencement of the descent*, which does not exist when the specified ancestor is in the male line.

Alienation of qualified fee simple.

Another question remains which would be of the greatest practical importance if these limitations were more frequently met with.

There is nothing to suggest that the grantee, or the inheritor, of a qualified fee simple is subject to any restraint upon his power to alienate the estate. But the question has been raised, what estate is taken by the person to whom, upon an alienation, the estate is conveyed, and whether in his hands the estate becomes a fee simple absolute.

Preston's opinion.

Preston has repeatedly expressed the opinion, that the grantee, or the inheritor, of a qualified fee simple has, for the purpose of alienation, only a *determinable fee;* that he cannot convey a fee simple; and that the estate, in the hands of an assignee, will determine, *if and when the particular class of the heirs of the grantee, to whom it was originally limited, should come to an end.* He also holds that, upon the determination of the estate, there is no escheat to the lord (which is peculiar to fees simple absolute) but a reverter to the heirs of the person by whom the re-feoffment was made. (1 Prest. Est. 471; see also, pp. 420, 466, 468, and 469.)

Examination of Preston's opinion.

These propositions are so startling that, in spite of the authority of Preston, some hesitation in accepting them is perhaps not wholly inexcusable.

Lord Coke, as we have seen, informs us, that Littleton's design in prescribing this form of limitation under the above-mentioned circumstances, was to prevent the inheritance from descending upon any persons who would not have been inheritable if the re-feoffment had been made strictly according to the condition. But the condition expressly imported, that the re-feoffment should be made for a fee simple absolute—"to have and to hold to them and to *their heirs for ever.*" (Litt. sect. 354.) And it is difficult to believe that Littleton would

have recommended this device, if he had thought that its adoption would cause a much more serious breach of the condition—by substituting, for all purposes of subsequent alienation, a determinable fee for a fee simple absolute—than the breach which it was designed to avoid. This seems to show, that Littleton and Lord Coke would not, upon this point, have concurred in opinion with Preston.

On a descent cast, from a father as a purchaser in fee simple absolute, to his son as heir-at-law, the heirs *ex parte materná* of the son would be excluded from the succession, both by the common law and under the Descent Act, 3 & 4 Will. 4, c. 106. A fee simple absolute is, in this respect, placed in the same position as a qualified fee simple, by the mere fact of a descent having taken place. But it has, of course, never been suggested by any one that the heir, succeeding by inheritance to a fee simple absolute, cannot alienate for a fee simple absolute. The account given by Lord Coke of Littleton's motive makes it very difficult to doubt that, when he prescribed or invented the limitation of qualified fees simple, he thought that his device would place the grantee in every respect—in respect to the *quantum* of the estate, as well as in respect to the persons who might succeed to it—in the same position as if the re-feoffment had been actually made during the lifetime of one or more of the *plusors homes* specified in the condition.

Moreover, it is difficult to see how, unless by the legal fiction which deems an estate *pur autre vie* to be less in *quantum* than an estate for the life of the tenant, a qualified fee simple is generally less in *quantum* than a fee simple absolute. It is true that only some, not all, heirs of the grantee are inheritable; but it is not therefore generally true, that fewer persons are by possibility inheritable to a qualified fee simple than to a fee simple absolute. The persons to inherit are the heirs of the specified ancestor; and there is no reason why these should be less numerous than the heirs of the grantee. Unless a pedigree is accidentally cut short by bastardy, or (before the abolition of corruption of blood) by attainder, the heirs general of any specified person whatever are, for all practical purposes, indefinite in number. And if a pedigree should accidentally be cut short in this way, it would be cut short for the purposes of a limitation in fee simple

absolute, precisely in the same way and to the same extent as for the purposes of the limitation of a qualified fee simple. There is no question that, for purposes of limitation, the heirs general of a bastard stand in the same position as the heirs general of any other person, and that a limitation to a bastard and his heirs gives rise to a fee simple absolute. (*Vide supra*, p. 171.)

This seems also to be a reason for concluding that Preston's doctrine of the determinable quality, for purposes of alienation, of a qualified fee simple, even though it were admitted, would be practically nugatory. For the case of a claim by virtue of a supposed reverter, is not at all analogous to the case of an escheat, in which the *mere non-appearance* of the heir, leaving thereby a vacancy of the freehold, is sufficient to justify the entry of the lord. Even granting that there is a possibility of reverter upon a qualified fee simple, the burden of showing whether the event has happened which brings the reverter into operation, must lie upon the person who claims by virtue of the reverter, not upon the person who claims to retain the estate as against the reverter. In general, this would evidently be impossible, and it follows that the grantee of the fee would, for all practical purposes, be generally in exactly the same position as the grantee of a fee simple absolute.

Conclusion against Preston's opinion.

For the foregoing reasons, the present writer humbly conceives that Preston's doctrine upon this point cannot safely be relied upon; and that, if it could possibly become a question of practical importance, it might not improbably be overruled.

Littleton's form of limitation seems to be unaffected by the Descent Act.

There also seems to be no sufficient reason to suppose that, if the form of limitation prescribed by Littleton is valid by the common law, its validity is affected by the Descent Act, 3 & 4 Will. 4, c. 106, or by 22 & 23 Vict. c. 35, s. 19. It is true that sect. 2 of 3 & 4 Will. 4, c. 106, enacts, that in every case descent shall be traced from *the purchaser;* and that by sect. 1, "the purchaser" is defined to mean, "the person who last acquired the land *otherwise than by descent*, or than by any escheat, partition, or enclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent." But the language of the

rest of the Act, and in particular, of the rest of sect. 2, suggests the inference, that this part of the Act was not designed to affect special limitations, but only to deal with those limitations which are made to the heirs simply; and that the effect of the Act, so far as qualified fees simple are concerned, is only to regulate the way in which the descent is to be traced from the ancestor specified in the limitation. It is difficult to suppose that the general language of the Act was designed to deprive conveyancers of a legal means to fulfil a lawfully imposed obligation, which had been provided by the common law.

Moreover, it seems to be impossible to contend, that the above-cited language was intended to apply to qualified fees simple, in such a sense as to forbid the descent to be traced from the specified ancestor, without at the same time admitting that it has the like effect upon the well-known and universally recognized limitations in fee tail, to a man and the *heirs of the body* of a specified ancestor. (*Vide infra*, p. 241.) And it is exceedingly difficult to suppose that the Act was designed, by the use of general language which admits of a different interpretation, to effect a partial repeal of the statute *De Donis*.

Here the reader may remark that Blackstone, in the passage cited at p. 220, *supra*, says that, in the case of fees tail, "the rule is strictly observed, and *none but the lineal descendants of the first donee are admitted.*" It is impossible that Blackstone can have intended to deny the validity of a limitation to a man and the heirs *of the body* of his father; and the argument seems to be conclusive, that when he wrote the passage these peculiar limitations, whether in fee tail or in fee simple, were entirely absent from his thoughts.

Analogous limitations to heirs as purchasers.

In settlements, especially when made by will, an ultimate limitation is not unfrequently found, *to the right heirs* of a specified person who does not, by the same instrument, take any precedent estate of freehold. The absence of a precedent estate of freehold prevents the rule in Shelley's case from applying; and the limitation will therefore give an estate of inheritance to the heirs as purchasers. What is the exact *quantum* of this estate, at common law, is a question that perhaps admits of

doubt. Fearne seems to have thought that the estate is, at common law, a fee simple absolute; and that it is taken by the person in whom it first vests, and descends from him in the same manner as a fee simple limited to a purchaser by name. (Fearne, Cont. Rem. 192.) Preston admits this to be the opinion generally entertained. (1 Prest. Est. 453.) But he seems to have thought that, in respect to its descent, the estate is in the nature of a qualified fee simple; that is, that the descent must be traced upon the hypothesis that the ancestor, not the heir who takes by purchase, was the purchaser. But he admits that, for the purpose of alienation, the estate is a fee simple absolute. (1 Prest. Est. 458.)

At most, the Descent Act only prescribes a novel form of limitation without affecting the validity of the estate.

Under such limitations, when they arise by virtue of any deed executed after 31st December, 1833, or the will of any testator dying after that date, the descent, by the Descent Act, 3 & 4 Will. 4, c. 106, s. 4, will "be traced as if the ancestor named in such limitation had been the purchaser of such land." It seems to follow, not only that qualified fees simple are not now unknown to the law, but that they exist by virtue of an express statute. The whole question must in future be a mere question as to the proper form of limitation to be used for creating them. If the precise form of limitation prescribed by Littleton has been invalidated by the Descent Act, precisely the same result might nevertheless be effected by conveying the lands to a stranger, *habendum* to the stranger and his heirs *To the use of the heirs of the last survivor*. This consideration, that the effect of the Descent Act is at any rate restricted to modifying the appropriate limitation under which a qualified fee simple will arise, is very material to the contention of the respondent in the case of *Blake* v. *Hynes*, mentioned in the next following paragraph.

Remarks upon the case of *Blake* v. *Hynes*.

In the earlier editions of this work some doubt was expressed whether the species of limitation now under discussion had ever occurred or would ever occur in practice. In May, 1884, the question of its validity for the first time was raised, in a case before the House of Lords on appeal from Ireland, *Blake* v. *Hynes*, reported before the Irish Courts in L. R. (Ir.) 11 Eq. 417, 11 L. R. Ir. 284.

Blake v. *Hynes.*

The material circumstances in the case of *Blake* v. *Hynes* were as follows: Columbus O'Flanagan died in 1857, leaving a will which was duly proved; and his real and personal estate was subsequently administered in the Irish Court of Chancery. His co-heirs at law were two nieces named Eliza Dowell and Jane Dowell. In the course of the administration proceedings an Order was made by consent of all parties, dated 20th May, 1859; by which it was ordered (*inter alia*) that notwithstanding the probate, which was declared valid, of the testator's will, *the right of his coheirs as to certain lands thereby devised should be the same as if he had died intestate as to the said lands.* Jane Dowell, who was a lunatic at the time of the testator's death, died insane and intestate as to her moiety in the said lands. The proceedings out of which the appeal to the House of Lords arose were instituted in 1873, under the Lunacy (Ireland) Regulation Act, 1871, s. 55, for the administration of her real and personal estate. At the time of her death her heirs at law were Edward Blake and Thomas Hynes, claiming respectively under two deceased aunts of the lunatic, who, if they had been living, would have been her co-heirs; and at the same time the heir at law of the original testator Columbus O'Flanagan was Roderick O'Connor. Among other questions the question arose, whether Jane Dowell had taken her moiety, to which she was entitled under the terms of the Order of 20th May, 1859, to all intents and purposes as a purchaser; in which case, upon her death intestate, it would have descended to her heirs at law; or whether, by virtue of the said Order, the lands must be held to descend as though the original testator, Columbus O'Flanagan, had been the last purchaser; in which case the moiety in dispute would pass to Roderick O'Connor as being his heir at law at the time of Jane Dowell's death.

The Master of the Rolls in Ireland held that Jane Dowell had taken as a purchaser, and that her moiety accordingly descended to her co-heirs at law. This decision was unanimously reversed by the Court of Appeal in Ireland, consisting of the Lord Chancellor, the Chief Justice of the Common Pleas, and the Lords Justices Deasy and Fitzgibbon, who held that the moiety in dispute passed to Roderick O'Connor as the heir at law of Columbus O'Flanagan.

Hitherto the question as to the validity at common law of a limitation in the form above styled a qualified fee simple, was not explicitly raised; but the Lord Justice Fitzgibbon, in the course of his judgment, made the following remark, which bears very closely upon it:—"If conveyances had been settled [with a view to carry into effect the directions of the Order of 20th May, 1859, as to the rights of Eliza and Jane Dowell in respect to the said lands] it would have been the duty of those carrying out the arrangement to see that the descent of the lunatic's [moiety in the] lands was not altered from that which was stipulated for; namely, the descent of lands taken by her as co-heiress of Columbus O'Flanagan under an intestacy." *Blake* v. *Hynes.*

Edward Blake, one of the co-heirs of Jane Dowell, appealed to the House of Lords from the decision of the Court of Appeal; and upon this occasion the question of the validity of the limitations under discussion was explicitly raised. The question was argued before the House, and the respondent's counsel rested their argument in favour of its validity upon the authority of Littleton, Lord Coke, and Preston. At the conclusion of the arguments, the House reserved its judgment; and the appeal was subsequently compromised before any judgment had been delivered.

CHAPTER XX.

FEES TAIL, OR ESTATES TAIL.

Definition.

A FEE TAIL is simply a conditional fee at the common law, modified in certain respects by the statute *De Donis Conditionalibus*, or Stat. West. 2, 13 Edw. 1, cap. 1. The list given above, of limitations applicable to a conditional fee, does not contain every limitation which is theoretically applicable to the limitation of a fee tail; but it includes every form which occurs, or ought to occur, in practice, in the express limitation of a fee tail to a donee, or donees. It also includes some which, in all probability, have never been actually used. No motive can be imagined which would be likely to induce anyone to limit a fee tail to heirs female,* though nothing is more common than the limitation of a fee tail to heirs male. The former kind of limitation was probably suggested by the latter; and it probably exists only in the logical imagination of text writers. But there is no reasonable doubt as to its legal validity; which, indeed, is expressly recognized by the Conveyancing Act of 1881, s. 51.

On the operation of the statute *De Donis.*

The modifications introduced by the statute into a conditional fee, refer chiefly to the power of the donee, or tenant in tail for the time being, by alienation to bar the succession of his issue and the reverter of the donor. It was observed above, that at common law the issue could be so barred even before their birth, but that the donor's reverter could not be barred until after the

* See Harg. n. 1 on Co. Litt. 25 a, where he makes mention of an attempt to prove in argument that limitations in tail female are invalid. In *Goodtitle* v. *Burtenshaw*, Fearne, Cont. Rem. App. No. I. a limitation occurred to the heirs female, and in *Chambers* v. *Taylor*, 2 My. & Cr. 376, a limitation occurred to the heir female, but in both cases as purchasers. From some remarks made by Lord Coke (Co. Litt. 377 a) it may perhaps be inferred that limitations in tail female, in remainder upon a limitation in tail male, may actually have occurred, as the work of short-sighted conveyancers, who mistook their effect. Lord Coke points out the danger of such limitations, and shows that the proper limitation to effect the probable intention, is a limitation in tail general, in remainder upon a limitation in tail male. (See also Co. Litt. 25 b.)

birth of inheritable issue. The statute *De Donis* enacted that in future no such alienation should be a bar either to the succession of the issue or to the reverter of the donor. In other respects, a fee tail not only *resembles*, but *actually is*, a conditional fee. In the language of Butler, "this statute did not create any new estate, but, by disaffirming the supposed performance of the condition, preserved the fee to the issue, while there was issue to take it, and the reversion to the donor when the issue failed." (Butl. n. 2 on Co. Litt. 327 a.)

It is a fact to be borne in mind, that a simple repeal of the statute *De Donis* would instantly and *ipso facto* transform all fees tail, even those already in existence, into conditional fees at the common law.

To the above-stated effect of the statute, in restraining alienation, must further be added its effect in preventing the descent of the fee to persons not included in the original form of the gift, which, under certain circumstances, was permitted by the common law; and also its effect in permitting the limitation of remainders over in expectancy, which the common law did not permit.

The precise nature of these several points of difference will appear from the following short examination.

The statute, having particularly mentioned in its preamble three examples of conditional fees, which examples are mentioned by way of specifying the whole class and not by way of confining the operation of the Act to those examples (2 Inst. 334), and having recited that the construction put by the common law upon such gifts, being directly repugnant to the form of the gift, was a grievance calling for remedy, enacts as follows:—

Form of the statute.

"That the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land (*tenementum*) was given under such condition, shall have no power to aliene the land (*tenementum*) so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail [either by an absolute default of issue, or, after the birth of issue, by its subsequent extinction*].

* *Per hoc, quod nullus sit exitus omnino, vel si aliquis exitus fuerit, per mortem deficiet, heredis hujusmodi exitûs deficiente.* The English version (1 Stat. Rev. p. 42) is here unintelligible.

"Neither shall the second husband of any such woman" (*i. e.* a female donee in special tail) "from henceforth have anything in the land (*in tenemento*) so given upon condition, after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife, to whom the land (*tenementum*) was so given, it shall come to their issue, or return unto the giver, or his heir, as before is said."

The effect of the first paragraph is to destroy the threefold capacity which the tenant of a conditional fee acquired by having issue of the prescribed class, to alienate, to forfeit by attainder,* and to charge with incumbrances.

Tenant in tail after possibility.

The effect of the second paragraph is that, if a gift is made either to a donee and his (or her) issue by a particular wife (or husband), or to two persons and their issue, then, on the *death* of the wife (or husband) of the donee, where there is a single donee, or, if there be two donees, upon the death of *either* of them, without leaving issue of the prescribed kind, there is no longer under any circumstances any possibility of the birth of issue inheritable under the entail, even though such issue has been in existence at some previous time; whereas, before the statute there was under such circumstances still a possibility that issue might be born capable of inheriting a conditional fee limited in like manner. (*Vide supra*, p. 212.) The survivor is, therefore, now styled *tenant in tail after possibility of issue extinct;* or sometimes, for brevity, *tenant in tail after possibility.*

The statute also, after prescribing a form for the new kinds of writ of formedon, which were needed to give effect to its provisions, continues as follows:—

And if a fine be levied hereafter upon such lands (*super hujusmodi tenementi*), it shall be void in the law; neither shall the heirs, or such as the reversion belongeth unto, though they be of full age, within England, and out of prison, need to make their claim.

It will hereafter be seen that this last enactment was deemed to be repealed, or superseded, by 4 Hen. 7, c. 24; and it was expressly superseded by 32 Hen. 8, c. 36. (*Vide infra*, p. 248.)

* As above mentioned, forfeiture by attainder of high treason was restored by statute, and finally abolished by 33 & 34 Vict. c. 23, s. 1.

Classification of Estates Tail.

It will appear, upon viewing the limitations which are applicable to the creation of conditional fees (*supra*, p. 209) that there exists a twofold division of fees tail, one founded upon the fact that the descent might be restricted to one sex, the other founded upon the fact that the gift might be made to the issue of more than one body.

Tail male and tail female.

The restriction of the line of descent to a single sex, is indicated by the addition of the epithets *male* or *female* respectively, and the absence of such addition indicates the absence of restriction.

Special tail.

When the gift is to a single donee and his (or her) issue by a particular wife (or husband), or is to two donees and their joint issue, the restricted character of the gift, and of the issue inheritable under the gift, is indicated by the epithet *special*. The absence of such restriction is sometimes indicated by the addition of the epithet *general*, but more commonly by the absence of any epithet.

Suggestion as to the epithets *general* and *special*.

Lord Coke, in his translation of Littleton, indifferently uses the phrases *general tail* and *tail general*, and the phrases *special tail* and *tail special*. (See Litt. sects. 14, 16.) It would be a very convenient practice to use the phrase *general tail* to denote the opposite to *special tail*, and the phrase *tail general* to denote the opposite to *tail male* and *tail female*. This usage will be adopted in the following pages.

Thus we have the following divisions of fees tail:—

1. Accordingly as the heir *per formam doni* is unrestricted in respect to sex, or is restricted to one sex.
 - TAIL GENERAL; when the heir *per formam doni* is designated as the heir of the body simply, and therefore coincides with the heir general in the direct line of descent.
 - TAIL SPECIAL, or *tail male* and *tail female*; when the heir *per formam doni* is restricted to the *heir male*, or the *heir female*, and therefore does not necessarily coincide with the heir general in the direct line.

2. Accordingly as the heir *per formam doni* is specified *simpliciter*, or is restricted to the joint issue of more than one specified person.

- General Tail; when a single donee is simply specified as the body from which the heirs in tail (whether general, male, or female) must issue; so that all the heirs of that person, who come under the description in the form of the gift, by whatsoever wife (if the donee is a male), or by whatsoever husband (if the donee is a female), are inheritable under the entail.
- Special Tail, when the limitation imports that the heirs *per formam doni* must issue from more than one body; being either (1) to the heirs of the body (whether general, male, or female) of a specified donee by a specified wife (or husband); or (2) to the heirs of the body (whether general, male, or female) of two specified donees, either married or capable of lawful marriage.

Tenant in Tail after possibility of Issue extinct.

Definition.

Upon the death of one of two donees in special tail, or upon the death of the appointed wife (or husband) of a single donee in special tail, the survivor becomes tenant in tail after possibility of issue extinct. (Litt. sects. 32, 33.) Such a tenant is, for brevity, sometimes styled *tenant in tail after possibility*.

If the estate in special tail is an estate in remainder, which does not become the estate in possession until after such death as above mentioned, the survivor is nevertheless tenant in tail after possibility. (Co. Litt. 28 a.)

The tenancy must be caused by death.

But this tenancy can be created only by death, and not by act of the parties; and therefore, if two donees in special tail be divorced *a vinculo matrimonii*, they are thenceforward only joint tenants for life. (Co. Litt. 28 a, b.)

Since there is no presumption *de jure* that any person, however advanced in years, cannot have issue, no tenant in tail, except the original donee, or one of the original donees, in special tail, can be tenant in tail after possibility. (Co. Litt. 28 a.)

The duration of the estate of such tenant does not differ from the duration of a bare estate for life; and an exchange between a tenant after possibility and a tenant for life, is good. (Co. Litt. 28a.) But such tenant is not punishable for waste. (*Ibid.* 27 b; *Williams* v. *Williams*, 12 East, 209.)

The Limitation of Estates Tail.

The word *heirs* necessary at common law.

Before the coming into operation of the Conveyancing Act of 1881, the same rule obtained, with respect to the need for the word *heirs* in the limitation of a fee tail, as in the limitation of a fee simple, by reason of the derivation of a fee tail from a conditional fee. (Co. Litt. 20 a.)

Lord Coke (Co. Litt. 22 a) cites an old case,* without expressing either approval or disapproval, in which it seems to have been held that the word *heir*, in the singular, might be used as a word of limitation to create some kind of estate tail. But the form of the limitation there given is so strange and abnormal that it cannot safely be regarded as a precedent.

It is clear that in a will, the word *heir* may, as a word of limitation, create an estate tail. (*Richards* v. *Lady Bergavenny*, 2 Vern. 324; *Dubber* v. *Trollope*, Ambl. 453.) In a *deed*, it seems that a limitation to the heir, not being by way of purchase, but as a word of limitation to create an estate, creates only an estate for life. (*Chambers* v. *Taylor*, 2 My. & Cr. 376.) In that case the heir (female) was held to take by purchase; but this view seems only to have been adopted because it was considered impossible that, as a word of limitation, the word could give an estate tail to the ancestor.

Also words of procreation.

Besides the word *heirs*, words to indicate the procreation of the heirs by or on the body of the donee were also necessary;

* "Of all the estates taile most coarcted or restrained, that I finde in our bookes, is the estate taile in 39 Ass. pl. 20, where lands were given to a man and to his wife and to one heire of their bodies lawfully begotten, and to one heire of the body of that heire only."

but such words were not necessarily express. The Latin, *de corpore*, *de corpore procreatis*, or *de corpore procreandis*, and in English, *of the body*, *of the body begotten*, or *of the body to be begotten*, with a similar use of the plural number in cases which require reference to be made to more than one body, were the most proper and formal words to effect the purpose; but the want of them might be supplied by inference, even in a deed. (*Beresford's case*, 7 Rep. 41; Co. Litt. 20 b.) With regard to the use of the participle *procreatis*, or *procreandis*, it is to be observed, that the past participle would include after-begotten issue, and the future participle would include issue already in being at the time of the gift. (Co. Litt. 20 b.) The use of the participle seems only to have been necessary in so far as it might be required to make clear the meaning of the other words used; and where this meaning was sufficiently clear without it, the participle might be, and often was, omitted in practice. It is evident that, upon these principles, the use of the participle is much more requisite in limitations in special tail, than in general tail.

With regard to the question, how far the absence of precise and formal words to denote the procreation of the heirs might be supplied by inference, there seems to be this distinction between a deed and a will, that in a will the inference might be drawn from the general intention of the testator, but in a deed it must follow from the language of the limitation itself.

Frankmarriage.

But the words *in frankmarriage*, or *in liberum maritagium*, will by themselves suffice for the limitation of an estate in special tail to a man and his wife, or intended wife; being for this purpose exactly equivalent to the words, *and to the heirs of their two bodies between them begotten*. The nature of this estate is subject to certain restrictions, and the validity of the gift depends upon the existence of certain conditions. (See Litt. sects. 17, 19, 20, and Lord Coke's comment.) The wife, or intended wife, must be the daughter, or other near blood relation, of the donor. (Dy. 286 b, pl. 46.) The donees and their issue in tail hold of the donor and his heirs, discharged of all services except fealty, until the fourth degree in descent

from the original donees is passed; after which event, the succeeding issue hold by such services as the donor owes to his lord next paramount. Gifts in frankmarriage are wholly obsolete in practice; but (the requisite conditions being, of course, fulfilled) they are still perfectly valid.

Adopting the arrangement above given (p. 209) with reference to conditional fees, the list of estates tail, and of the forms of their limitation, is as follows. For the sake of clearness and convenience, the masculine gender only is used in specifying a single donee:— Forms of limitation.

General Tail.

1. *General*:—To A. AND THE HEIRS OF HIS BODY BEGOTTEN. (Litt. sects. 14, 15.)
2. *Male*:—To A. AND THE HEIRS MALE OF HIS BODY BEGOTTEN. (Litt. sect. 21.)
3. *Female*:—To A. AND THE HEIRS FEMALE OF HIS BODY BEGOTTEN. (Litt. sect. 22.)

Special Tail.

4. *General*, one donee:—To A. AND HIS HEIRS WHICH HE SHALL BEGET ON THE BODY OF HIS (specified) WIFE. (Litt. sect. 29.)

 This is the proper form of such limitations. But it was decided in *Chudleigh's Case*, or *Dillon* v. *Freine*, 1 Rep. 120, at p. 140 b, resolution (5), that a limitation, *To A. and his heirs on the body of Jane S. begotten*, is sufficient for the purpose. This had previously been doubted, and a very plausible reason was alleged in favour of the doubt. (Lord Coke on Litt. sect. 29.)

 It has already been observed, that the female donee is not necessarily the wife at the time of the limitation. If not the wife, she is of course not so styled, but is named by her proper name.
5. *Male*, one donee:—To A. AND HIS HEIRS MALE WHICH, &c.
6. *Female*, one donee:—To A. AND HIS HEIRS FEMALE WHICH, &c.

SPECIAL TAIL.

7. *General*, two donees:—To A. AND B. AND THE HEIRS OF THEIR TWO BODIES BEGOTTEN. (Litt. sect. 16.) For another form of limitation, having the same operation, see Litt. sect. 28; but this latter is very undesirable to be used in practice.
8. *Male*, two donees:—To A. AND B. AND THE HEIRS MALE OF, &c. (Litt. sect. 25.)
9. *Female*, two donees: To A. AND B. AND THE HEIRS FEMALE OF, &c.

The foregoing limitations comprise all those which are properly used, in deeds, in the direct limitation of an estate tail, as a single estate, to one donee, or to two donees, as the case may require. This restriction excludes from consideration an immense number of limitations, some of which may be found in Littleton, Book I., chap. 2, on the general subject of fees tail, also sects. 283, 284, Lord Coke's comment, and the notes thereto; which are partly improper limitations of estates tail to a donee, or donees, and are partly mixed limitations of particular estates followed by estates tail. Such limitations, being very improper to be used in practice, can be of no service to the conveyancer, except as examples of what to shun. One specimen only will be noticed in a subsequent paragraph, for the sake of the light which it throws upon the limitation of qualified fees simple. (*Vide infra*, p. 241.)

Rules relating to their limitation.

The following general propositions relating to the creation of estates tail must also be noticed:—

(1.) There is no difference, in point of effect, between the words "the heirs" and the words "his heirs," or (in the case of a female) "her heirs." (Co. Litt. 26 a *ad fin.*; and note 1 on 26 b.) But in limitations to a single donee in special tail, the possessive pronoun adds something in clearness.

Moreover, the indifferent usage of the two words is safely permissible only in formal and direct limitations such as those above given. In special cases, the use of the word "his" may introduce an absurdity, which may

render the limitation void. For an example, see p. 241, *infra.*

(2.) The words "the heirs male or female" will amount to a limitation to the heirs general. (Co. Litt. 26 a.)

(3.) The word "heirs" is the word which creates the estate, and the estate tail is in the person, or persons, whose heirs are specified; so that, in all limitations in special tail, if the word is not referable to one donee more than to the other, the estate tail is in both donees jointly; but if the word refers to one donee rather than to the other, the estate tail is only in that one. (Lord Coke on Litt. sect. 28.)

(4.) Littleton and Lord Coke commonly repeat the word "to" before the word "heirs;" but Lord Coke not unfrequently omits it. The common practice of conveyancers sufficiently shows that the repetition is superfluous.

(5.) On a gift to a single donee in special tail, the wife (or husband) assigned to the donee is not necessarily a specified individual, but may be one of a specified class; for example, may be any person bearing a specified name. (*Page* v. *Hayward*, 2 Salk. 570.)

(6.) A limitation resembling a limitation in special tail, if made to two persons who are neither married nor capable of lawful marriage—as if they be of the same sex, or within the prohibited degrees of relationship—and who therefore cannot have an heir begotten of their two bodies, creates neither an estate in special tail, nor a joint estate tail; but it creates a joint estate for life and separate estates tail in common in remainder. (Litt. sect. 283 and Lord Coke's comment.) And a limitation to a man and two women, and the heirs of their bodies begotten, has a precisely similar operation. (Lord Coke on Litt. sect. 25.)

(7.) But the mere fact that, at the time of the limitation, lawful marriage is, by reason of the circumstances, impossible between the two donees,—as, for example, if they be both, or either, already married to another person,—will not prevent the limitation from taking effect to create an estate in special tail, if there is a possibility that the donees may at a future time become capable of lawful marriage. (Co. Litt. 20 b.) The mere fact that the donees are not married at the time, is, if they are then capable of lawful marriage, *à fortiori* no obstacle. But the circumstances may be such as to create a presumption of law that the parties, though their marriage is not absolutely impossible, will never marry; as for example, if, having been married, they were subsequently divorced *a vinculo matrimonii*. (Lord Hale, n. 2 on Co. Litt. 25 b; who cites two decisions from the Year Books.)

The word *heirs* not now necessary.

Sect. 51 of the Conveyancing Act of 1881, enacts, that in deeds executed after 31st December, 1881, it shall be sufficient, in the limitation of an estate in tail, to use the words *in tail* without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words *in tail male*, or *in tail female*, as the case requires, without the words heirs male of the body, or heirs female of the body.

A perusal of the foregoing remarks will show, that this enactment is founded upon a superficial view of the nature of limitations in tail. It is inapplicable to limitations to a single donee in special tail. Such limitations, though they were formerly common, do not occur in modern practice; but this cannot be the reason of their omission; for the remark is still more obviously true of estates in tail female, which are expressly included in the enactment, although they may probably never have occurred in practice at all.

The enactment is, however, of some practical use, since it simplifies certain forms of limitation which are of frequent occurrence in settlements.

A fee tail is a particular estate.

Upon every gift in tail by a donor seised in fee simple, there remains in the donor, by virtue of the statute, a reversion expectant upon the fee tail. (Litt. sect. 19, and Lord Coke's comment; *Willion* v. *Berkeley*, Plowd. 223, at p. 242.) And, therefore, a remainder may be limited in expectancy upon a fee tail, and the latter, though of inheritance, takes effect as a particular estate.

For some remarks upon the law of merger in relation to fees tail, see p. 72, *supra*.

Heirs of the body of an ancestor, as words of limitation in tail.

It plainly appears from Litt. sect. 30 and Lord Coke's comment that a limitation to A. and the heirs of the body of any ancestor whose heir he is, vests an estate tail in A., which is descendible, or rather transmissible, not only to his issue, but (on failure of his issue) to collateral relatives who are heirs of the body of the specified ancestor. (See also Dy. 247 b, pl. 76.) Lord Coke expressly lays it down, that a similar limitation to A. and *his* heirs, &c., is void for absurdity. If the ancestor is living at the time of the limitation, or if the donee is for any other reason not the heir of the ancestor, this does not make the limitation void; but alters the nature of the estate, or estates, arising under it, according to the special circumstances. Thus in *Mandeville's Case*, reported (*ubi supra*) by Lord Coke, where the specified heirs were not the heirs of the body of an ancestor at all, but were the heirs of the body of the deceased husband of the person named as donee, the limitation created a good estate tail, but in remainder upon an estate for life taken by the person named as donee. Similarly, a limitation to A. and the heirs of the body of his father, during the life of the father, gives rise to two distinct estates, an estate for life to A., followed by a contingent remainder in tail to the person who, at the death of the father, can bring himself within the description of heir of his body. (3 Prest. Conv. 77—79.) Therefore, if A. should die in the lifetime of the father, this contingent remainder will be destroyed, by the expiration, pending the contingency, of the precedent estate of freehold. If the father should die in the lifetime of A., leaving A. as the heir of his body, the remainder in tail will forthwith be vested in A., and his life estate will be

Mandeville's Case.

destroyed by merger, whereby the estate tail will become itself the estate in possession.

Entails of copyholds may exist by special custom.

A special custom to intail copyholds may exist in a manor, and is a good custom. (Litt. sect. 73; Co. Litt. 60 a, b; Co. Cop. Supp. sect. 12 = Co. Law Tr. p. 178; 6 Vin. Abr. 197 = *Copyhold*, F, e.) This proposition is now treated as an axiom beyond the reach of argument. It was denied *obiter* by the Chief Baron, Sir Roger Manwood, in *Heydon's Case*, 3 Rep. 7; and it would seem, from the report, that the rest of the barons concurred in his opinion; though Lord Coke, in the above-cited passage from the Supplement to his Compleat Copyholder, says it was "agreed" that by special custom lands might be intailed. (Co. Law Tr. 179.) In that case the question at issue was not, whether copyholds are within the statute *De Donis*, but whether they were within the statute 31 Hen. 8, c. 13, by which certain ecclesiastical leases are made void. It was undoubtedly denied by three out of four judges of the Court of Common Pleas in *Rowden* v. *Maltster*, Cro. Car. 42, that copyholds are intailable; see pp. 44, 45. In this case also the question was not material, because the special verdict had expressly found, that in the particular manor of which the lands were parcel, there existed no such special custom.

Otherwise, the estate is a conditional fee simple.

In the absence of a special custom, it is clearly settled that words of limitation which would create an entail in a common law fee, will, if applied to a customary fee, create a conditional fee simple, analogous to a conditional fee simple at common law. (*Rowden* v. *Maltster*, Cro. Car. 42; *Pullen* v. *Lord Middleton*, 9 Mod. 483; *Doe* v. *Clark*, 5 B. & Ald. 458; *Simpson* v. *Simpson*, 4 Bing. N. C. 333.)

Difficulty of accounting for entails of copyholds.

The theory laid down by Lord Coke, that the statute *De Donis* without a special custom does not extend to copyholds, and that a custom alone cannot avail to create an estate tail, is open to the stringent criticism, that by the hypothesis, a custom to intail could not, and therefore did not, exist before the statute, while, by the unquestioned rule of the law, no such custom could spring up after the statute. Relying upon this criticism, which was urged with great force by the Chief Baron, Sir Roger Manwood, the Court of Exchequer, as above men-

tioned, seems to have inclined in *Heydon's Case* towards the conclusion, that copyholds are not within the statute *De Donis*, and that all entails of copyholds are impossible. Watkins, pursuing a similar line of criticism, but being of opinion that copyholds are within the statute, strongly favours the opposite conclusion, that all copyholds which may be held for a customary fee simple, may be intailed without showing any special custom. (1 Watk. Cop. 215.) These conclusions are both equally logical. If it were necessary to choose between them, that of Sir Roger Manwood might perhaps be preferred; because his reasons for holding that copyholds are not within the statute seem to be decidedly better than those of Watkins for holding that they are within it. But for all purposes of practice, it is now settled that neither conclusion represents the law.*

* Lord Coke was, of course, aware of the difficulty involved in his theory, and he endeavours to meet it with great ingenuity, suggesting that, before the statute, there might have been a custom to limit remainders over upon such an estate in copyholds, and that the issue may have avoided alienations made by their ancestor, or have recovered the lands by writs of formedon *en descender*; or rather by plaints in the Lord's Court in the nature of such writs. (Co. Litt. 60 b.) This is repeated out of 3 Rep. 8 b, where the same argument is used against Sir Roger Manwood's criticism. But hereupon Watkins asks, what else such a state of things would mean, but that a custom before the statute *could* create an estate tail in fact, whether so styled or not: which Lord Coke had expressly denied. (1 Watk. Cop. 215.) A very learned person once suggested to the present writer, as a possible explanation of Lord Coke's apparent contradiction in terms, that a custom to intail copyholds, with all the incidents of entail, might possibly have existed in fact before the statute, in the sense that it was actually observed; but that it was then a *bad* custom, which might successfully have been contested in a court of law, though it was in fact acquiesced in, and that what the statute did was to make it a *good* custom by removing the legal objection. Watkins has cited a custom of the manor of Dymock, inrolled in Chancery as "old and ancient" in the time of Queen Elizabeth, and which may, therefore, not improbably be older than the statute *De Donis*, which imports that a copyholder of that manor, having an estate to him and the heirs of his body, might lawfully alienate the same by deed to another person and the heirs of his body, which clearly must have been something different from a conditional fee. (1 Watk. Cop. 208; 2 *ibid.* 488.) Can this be the real form of the missing custom? But this is something quite different from what Lord Coke suggests.

The report of *Heydon's Case* in Serj. Moore's Rep. 128, which manifestly refers to the case reported by Lord Coke, does not contain any hint of this discussion about the statute *De Donis*. In Lord Coke's report, the discussion takes the form of a debate between Sir Roger Manwood and some unnamed person or persons, whose remarks are introduced by *formulæ* of objection; and it does not readily appear whether these objections came from the counsel or from the other judges.

CHAPTER XXI.

THE ALIENATION OF FEES TAIL.

Origin of the application of fines and recoveries to bar entails.

FEES tail owed their origin to a statute, of which the express intent and policy was to restrain alienation. It is commonly said that for about two centuries they remained inalienable. This remark is so far true, that for about that space of time the tenant in tail was unable by any assurance to convey an estate which was not liable to be avoided after his death by the issue inheritable under the entail. The motives which induced a parliament, chiefly consisting of persons having estates of fee simple, to give themselves power, by means of the statute *De Donis*, to settle their estates inalienably, are too obvious to require mention. A much more remarkable circumstance in the history of the law is the extreme pertinacity with which the courts have almost always struggled to promote and preserve freedom of alienation. The intricacies of our real property law at length, after the lapse of about two centuries from the passing of the statute, during which time, as Lord Coke informs us, repeated attempts at repealing it were vainly made in parliament, furnished the judges with a means to repeal the statute in practice by permitting, or rather encouraging, its perpetual evasion. A lineal warranty by the ancestor, if accompanied by assets, was a bar to the issue in tail; though the bar continued only so long as the assets continued to accompany it. Upon this fact was founded, by an ingenious fiction, of which the origin is commonly attributed to some *obiter dicta* of the judges in *Taltarum's Case*, the theory of a common recovery as an assurance by tenant in tail. But it is evident from the language of Lord Coke, that the idea of using this fiction to bar entails had for a long time previously engaged the attention of the judges. (See 6 Rep. 40 b; 10 Rep. 37 b.) A determined effort was made at the bar, in *Mary Portington's Case*, 10 Rep. 35, to withstand the then established practice of permitting

entails to be barred by means of common recoveries; which took the form of insisting that a condition of forfeiture, upon doing or concurring in any act to bar an entail, was a good condition at law. The court was compelled, unless it would lose all the fruit of its former evasion, to decide that such a condition was void. The reasons of this decision cannot be brought within the reasons in favour of common recoveries deduced from *Taltarum's Case;* which are in exact accordance with the theory of the law, and are an evasion of the statute only because the judgment of recovery pronounced against the common vouchee was well known to be a sham judgment. Neither can the decision in *Mary Portington's Case* be brought strictly within the reasons of *Corbet's Case*, 1 Rep. 83, and *Mildmay's Case*, 6 Rep. 40; in which the nature of the condition was rather such as to defeat the legal effect of a common recovery, than to bind the tenant in tail not to suffer one. That the court found great difficulty, in *Mary Portington's Case*, about taking the further step which had then become necessary, appears by the fact that the case depended in court during fourteen terms, and was argued more than seven times at the bar, and more than once by the bench. (10 Rep. 37 a.) After the decision of that case, until the abolition of recoveries by the Fines and Recoveries Act, it became an axiom of conveyancers, that by no device was it possible to restrain a tenant in tail from barring the entail by means of a common recovery, whenever suffering a common recovery would have that effect. Fines owed their efficacy as a similar assurance to the statutes 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, commonly called the Statutes of Fines. It is a highly significant circumstance, that the latter statute was passed to legalise, by express enactment, a second manifest fraud upon the statute *De Donis*.

The learning of these now obsolete assurances is still needed to understand old titles. The analogy of their operation has been in some important respects followed by the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, in prescribing new methods of barring entails, and the remainders and reversions thereupon; and in certain cases the person who, under the former practice, would have been the proper person to have made the tenant to

the *præcipe*, for suffering a common recovery, must even now concur in the barring of an entail.*

The following method, also now obsolete, of barring an estate tail, may be here noticed. During the interval which elapsed between 43 Eliz. c. 4, which was designed to facilitate the application of property to charitable uses, and 9 Geo. 2, c. 36, which prevents land from being devised to charitable uses, it was held that, in equity, a devise by tenant in tail to charitable uses was valid, as an appointment within the meaning of the first-cited statute, without a fine levied, or a recovery suffered, by the testator. (*Attorney-General* v. *Rye*, 2 Vern. 453. And see cases in note at p. 454, Raithby's ed.)

Nature of a fine.

A fine was an action (for the present purpose, but not necessarily, a collusive action) commenced upon any kind of writ by which lands might be either demanded or charged, which was compromised by leave of the court, the claim of the plaintiff, or *conusee*, being acknowledged by the defendant, who was styled the deforceant, or *conusor*. According to the common classification, a fine might be of four kinds, (1) a fine *sur conusance de droit come ceo, que il ad de son done*, which is often, for brevity, styled a fine *come ceo;* and the word fine, when used alone, commonly refers to this species ; (2) a fine *sur conusance de droit tantum;* (3) a fine *sur concessit;* and (4) a fine *sur done, grant et render*. (See Shep. T. 4 ; 2 Bl. Com. ch. 21 ; Cruise, 1 Fines and Rec. 2nd ed. ch. 4 ; 3rd ed. ch. 3.) Of these four kinds, only two are distinguished by essential differences; for the second is a mutilated version of the first, and the fourth is a combination of the first and third.

Fines at common law and statutory fines.

The fourfold division of fines above specified refers to the individual character of the assurance. In respect to the general mode of their operation, or the general source from which they

* See the Fines and Recoveries Act, ss. 29, 30, 31. A proof that the operation at the present day of sect. 29 is not impossible, occurred in a title which came before the writer in 1880. Such an occurrence will be possible, so long as there are living any persons who took particular estates preceding estates tail, created by settlements executed before 1st January, 1834. (*Vide infra*, p. 260.)

derive their efficacy, fines are divided into fines levied at the common law, and fines levied by virtue of the statute. In both cases, the importance of the assurance depended upon the degree in which it operated as a bar to all claims which were not prosecuted within certain limits of time after the completion of the fine.

By the common law the title conferred by a fine was a bar to the claims of all persons, whether parties or privies to the fine or not, who, not being under disability, did not prosecute their claims within a year and a day. This bar by non-claim was abolished by 34 Edw. 3, c. 16, called the Statute of Non-claim, and was restored with modifications by 1 Ric. 3, c. 7; which statute was soon rendered practically obsolete (though it was not expressly repealed until 1863) by the first Statute of Fines, 4 Hen. 7, c. 24.

The first Statute of Fines.

The last-mentioned statute enacted that, proclamation of the fine having been made as therein mentioned, the fine should be a final end and conclude as well privies as strangers to the same, except persons under specified disabilities, other than parties to the fine; saving to all persons other than the parties, such right as they might have at the time of the fine, so that they should pursue their title by way of action, or lawful entry within five years next after the proclamations; and saving to all other persons such right as might subsequently accrue to them, so that they should pursue their title within five years of its accruing. The provisions last specified are commonly referred to as the *first saving* and the *second saving* respectively.

The statute also allows to persons under disability, other than married women parties to the fine, five years from the cessation of the disability during which to prosecute their claims by action or entry; but enacts that if they should not pursue their remedy as aforesaid, they and their heirs should be concluded for ever, in like form as parties or privies to the fine. It also saves to all persons, not being parties or privies, the right (which existed at common law) to avoid the fine upon an averment *partes finis nihil habuerunt*, if none of the parties had an estate of freehold in the lands.

The theory of fines as assurances by tenant in tail.

After the Statute of Non-claim, a fine levied merely at common law, without the proclamations enjoined by the statute, operated only by way of estoppel, and therefore it bound only the parties thereto and the privies in estate of the parties. At common law, the issue in tail were not regarded as being privy in estate to any preceding tenant in tail, and the estoppel of the latter was no estoppel to the former. In other words, the issue in tail were not, as such, bound by a fine levied at common law by their ancestor in the entail. (1 Prest. Conv. 213.) The only fines that would bind the issue in tail were fines levied with proclamations by virtue of the statute; and this operation was derived from a strained judicial construction, subsequently confirmed by legislative enactment.

It seems to have been inferred from the above-stated provisions that the issue in tail, though not parties, were privies within the meaning of the statute. A majority of the judges in the year 19 Hen. 8, held, in accordance with this opinion, that by a fine levied with proclamations by a tenant in tail under the statute, the issue in tail were immediately and finally barred, nor were allowed any time to prosecute their claim upon the death of the tenant in tail by whom the fine was levied. (Dy. 2 b, pl. 1.) In that case, the five years mentioned by the statute had in fact expired during the lifetime of the tenant in tail; and it does not quite clearly appear from Dyer's report, whether the judges who held that the issue in tail were barred by the fine, thought that this lapse of the five years was material. But it would rather seem, that they considered the issue in tail to be immediately barred, as being privies within the meaning of the statute, and as not being within the saving clauses.

Though this decision was manifestly repugnant to the provision of the statute *De Donis*, "if a fine be levied hereafter of such lands, it shall be void in the law," its principle was expressly affirmed by the second Statute of Fines, 32 Hen. 8, c. 36; which enacts, that all fines levied with proclamations, whether before or after the Act, by any person of full age, of any hereditaments intailed to him or any of his ancestors, in possession, reversion, remainder, or in use, should be, immediately after the fine levied, engrossed, and proclamations made, deemed to all intents and

The second Statute of Fines.

purposes a sufficient bar for ever against such person and his heirs claiming the same hereditaments or any parcel thereof only by force of any such entail.

Some remarks upon the operation of fines as against strangers, will be found at p. 317, *infra*.

The bearing of warranty upon common recoveries.

A warranty was a covenant real annexed to an estate of freehold, arising either by implication of law, or by express contract. (Prest. Shep. T. 181.) As an express contract, a warranty could be created only by the use of the word *warrantizo* or *warrant*. (Litt. sect. 733.) The benefit of the warranty (if the estate of freehold was also of inheritance) descended to the heir of the warrantee, and the burden to the heir of the warrantor. The warranty conveyed no estate, but, so far as it was effectual, operated as a bar to prevent the heir of the warrantor from enforcing a claim to the lands as against the heir of the warrantee. The epithets *lineal* and *collateral*, as applied to warranties, do not refer to the lineal or collateral descent of the heir of the warrantor from his ancestor; but solely to the question, whether his claim by inheritance, or (under an entail) by quasi-inheritance, to the lands, and his liability to the warranty, were both derived from the same ancestor through the same line of descent, or not. In the former case the warranty was lineal, in the latter collateral. (1 Prest. Abstr. 410, 411.) The person to be bound must in either case be the heir of the warrantor, in order that the burden of the warranty might descend upon him; and in order to constitute a lineal warranty, it was necessary that the heir, in deducing his title, should be obliged to name the warrantor in his pedigree. Thus a warranty made by the donee in tail would be lineal in respect to all the issue in tail; and the warranty of any subsequent tenant in tail would be lineal to all the issue in tail inheritable after himself. The only point in the intricate learning of warranties which requires to be noticed, is, that a lineal warranty, if accompanied in its descent by assets, but not otherwise, was a bar to the issue in tail, notwithstanding the statute *De Donis*, in respect of the estate tail. (Litt. sect. 712; Co. Litt. 374 b.) The efficacy of a common recovery, as an assurance by tenant in tail, depends upon this proposition.

Warranties now ineffectual.

Warranties made after 31st December, 1833, are, by the Statute of Limitation, 3 & 4 Will. 4, c. 27, s. 39, made ineffectual (as to lands in England) to toll or defeat any entry or action for the recovery of land.

By the Fines and Recoveries Act, s. 14, all warranties of lands (in England) made after the same date by any tenant in tail, are made absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail. The Irish Fines and Recoveries Act, 3 & 4 Will. 4, c. 92, s. 11, contains a similar provision as to lands in Ireland.

Taltarum's Case, M. 12 Edw. 4, pl. 25, f. 19 a.

Taltarum's Case seems to have been to the following purport. Humfery Smith, being actually seised of certain lands by descent, as tenant in tail general, made a feoffment thereof to one Tregos in fee simple. By this feoffment he discontinued both his former estate tail and also all remainders, and the reversion, if any, subsisting thereupon; so that all persons claiming under any of such discontinued estates, could thenceforward prosecute their respective claims only by means of a real action. Tregos then enfeoffed Humfery Smith and Jane his wife in special tail general, with remainder to Humfery Smith in fee simple. Jane the wife died, leaving, as the report states, Humfery Smith sole tenant in tail after possibility of issue extinct. One Taltarum, upon some claim of title not material to be stated, had some time before the bringing of the present action, sued a writ of right against Humfery Smith; and the proceedings had upon this writ were precisely identical with the proceedings which in later times were followed in a common recovery with single voucher. Humfery Smith vouched to warranty one Richard King, who appeared and admitted the warranty, and subsequently made default. Judgment was thereupon given, that the demandant, Taltarum, should recover the lands against Humfery Smith, and that the latter should recover lands of equal value against the vouchee Richard King. It would appear, so far as the rambling obscurity of the report allows anything to appear, that in the present case the question at issue was, whether a person claiming under the original entail, which had been discontinued by Humfery Smith's feoff-

ment to Tregos, was barred by this recovery. And it appears to have been held, that he was not barred; upon the ground that Humfery Smith (who was really seised under the tortious seisin acquired by his own feoffment to Tregos) had not been seised by force of the original entail, which was now sought to be barred, at the time when the recovery was suffered. From this the inference was deduced, that if Humfery Smith had been so seised by force of the original entail, the recovery would have been a good bar to the issue in tail claiming thereunder. And this inference, being acted upon in practice, was subsequently recognized by the courts, and became the foundation of common recoveries.

The nature of a common recovery.

A common recovery was a collusive action of recovery, not compromised, but prosecuted to judgment by the demandant or recoveror against the tenant or recoveree.* In its most usual form, as an assurance by a tenant in tail, it was brought by a collusive demandant against a collusive tenant, called the tenant to the *præcipe*, or writ sued out for the purpose of suffering the recovery, to whom an estate of freehold had been conveyed by the person in whom the immediate freehold in the lands was vested, in order to enable him to defend the action; for a common recovery was obliged to conform in all essential points to the real action which it collusively represented, and by the common law no action of recovery was well grounded unless brought against the actual tenant of the first estate of freehold in the lands sought to be recovered; for default of which the recovery might be *falsified*, or set aside, upon a plea of *non-tenure*. (Booth, Real Actions, p. 29; *ibid.* p. 80.)

Statutory tenant to the *præcipe*.

The common law rule which required that the tenant to the *præcipe* should be the person actually seised of the first estate of freehold, was found to be very inconvenient in places where it was the custom to let out lands on leases for lives at a rent; in which case the concurrence of the lessee was necessary, in order to make a tenant to the *præcipe*. By 14 Geo. 2, c. 20, ss. 1, 2, it was enacted, in effect, that all common recoveries suffered or

* The terms *plaintiff* and *defendant* are properly restricted to personal and mixed actions; the corresponding terms in real actions being *demandant* and *tenant*. (Co. Litt. 127 b.)

to be suffered without the concurrence of such lessees, should be as valid and effectual as if they had concurred, provided that the person next in remainder or reversion should convey an estate for life at least to the tenant to the *præcipe*.

Form of the proceedings in a recovery.

The tenant to the *præcipe* admitted the claim of the demandant, but vouched to warranty (*vocavit ad warrantizandum*) the tenant in tail, who admitted the warranty, but vouched over somebody else, always a man of straw, usually the crier of the court, who was therefore styled the common vouchee. The demandant then "craved leave to imparl" (*petiit licentiam interloquendi*); which being granted, the demandant and the common vouchee left the court together. Afterwards the demandant came into court without the common vouchee; and the latter, having been solemnly summoned and failing to appear, was adjudged "to have departed in contempt of the court and made default." Thereupon the demandant recovered the intailed lands against the tenant to the *præcipe*, who recovered lands of equal value against the tenant in tail, who recovered a similar recompense in value against the common vouchee. The recompense in value supposed to be recovered from the common vouchee, had the same effect in law as actual assets to make the warranty good against the issue in tail. (1 Rep. 94 b.) And since the recompense, if it had really been recovered, would have descended according to the descent of the lands for which it was a substitute, the remainderman or reversioner was equally within the benefit of the recompense, and was held to be equally barred by the recovery.

The above stated reasons were originally brought forward, at the time when common recoveries were introduced into practice, to explain their operation in barring remaindermen and reversioners. Afterwards, when their use for this purpose had become general, their operation was extended to cases which did not fall within the original reasons; for example, a tenant in tail, who had previously levied a fine and thereby destroyed his estate as an entail, was allowed to bar the remaindermen and reversioner by a subsequently suffered recovery.

In 1744 the following definition was given by Lord Chief

Justice Willes:—"A common recovery is a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee simple." (*Martin* v. *Strachan*, Willes, 444, at p. 451.)

Double and single voucher.

The recovery above described is styled a recovery with double voucher; and this was the form most commonly used. Recoveries might also be suffered in a similar form, *mutatis mutandis*, with single voucher only, or with more than two vouchers. In a recovery with single voucher, the tenant in tail was himself sued as tenant to the *præcipe*, and he vouched to warranty the common vouchee without having been himself vouched. A recovery with single voucher gave a secure title only when the tenant in tail by whom it was suffered was actually in possession, and was not also entitled in right to the lands under any other estate tail which had been devested or discontinued. The right under any such devested or discontinued estate tail would be barred by a recovery with double voucher, but not by a recovery with single voucher. (Cruise, 2 Fines and Rec. 245.)

The last known case in which a recovery was suffered with single voucher.

In a case in which an estate tail was subject to a conditional limitation over in the event of any attempted alienation by the tenant in tail, Fearne advised that he should bar the entail by suffering a recovery with single voucher, in order to avoid all question as to whether he might incur a forfeiture by previously executing any assurance for the purpose of making a tenant to the *præcipe*. (Fearne, Posth. Works, 336.)

Recovery with treble voucher.

A recovery was sometimes suffered with treble voucher, when one estate tail had been derived out of another estate tail, and both entails were in existence at the same time and in different persons. By separately vouching both the tenants in tail, both the entails were undoubtedly barred; and it was immaterial in what order they were vouched. (1 Prest. Conv. 127.) It seems, however, that the more usual practice was to suffer a recovery with only double voucher, and to vouch the two tenants in tail jointly, though in theory it might be doubtful whether a joint voucher was a sufficient bar to both entails. (*Ibid.* 128.)

Fines and recoveries now abolished.

Sect. 2 of the Fines and Recoveries Act enacts, that no fine shall be levied or common recovery suffered, except those then pending, after 31st December, 1833.

Effect of fine by tenant in tail.

As an assurance by a tenant in tail, a fine had this advantage over a recovery, that by virtue of the provisions of the 32 Hen. 8, c. 36, it could be levied without the concurrence of the tenant of the immediate freehold, while a recovery could not be suffered without obtaining either his concurrence or, in case the immediate freehold was in the hands of a lessee for lives at a rent, the concurrence of the statutory substitute provided by 14 Geo. 2, c. 20. Any estate tail, though in remainder, or contingency, or to arise by way of executory limitation, was barred by a fine (with proclamations) levied by the person entitled thereto. (1 Prest. Abstr. 402.) This clearly appears by the above-cited language of the statute.

But a fine barred only the issue in tail; so that a fee simple could not be obtained by it, unless one of the parties had also a remainder, or reversion, in fee simple expectant upon the estate tail. By a mere bar of the issue in tail, a base fee was created, which endured so long as there was in existence either the donee in tail or any issue who might have inherited under the entail. (*Vide infra*, p. 265, No. 1 of the list there given.)

Effect of a recovery.

A recovery barred as well the estate tail as also all remainders, and the reversion, expectant thereupon; and destroyed all executory limitations, determinable limitations, and conditions, annexed thereto, and all collateral powers by which the estate tail might have been defeated, whereby the person entitled to the benefit of the recovery obtained as large an estate as could by possibility have been made by the settlor who created the estate tail.*

* 1 Prest. Est. 426; 1 Prest. Abstr. 393; 3 Prest. Abstr. 137; 1 Prest. Conv. 2; *ibid.* 17. Not necessarily, as is commonly said, a fee simple. He remarks, however, that the point has never been actually decided. But it seems to be too obviously true to need decision. It is also to be observed that the language of the Fines and Recoveries Act, s. 15, which enables a tenant in tail (subject to certain conditions) to dispose of the intailed lands as against the issue in tail, and also all persons whose estates are to take effect *after the determination or in defeasance* of the estate tail, does not affect persons claiming by title paramount to that of the settlor. An estate tail may be derived out of a determinable fee; and in such a case the estate tail itself, or any base fee into which it may have been converted, and also any estate, though purporting to be a fee simple, created by any disposition made by the tenant in tail under the Act, will, *ipso facto*, cease and determine upon the determination of the determinable fee out of which they were derived. (*Cessante statu primitivo, cessat derivativus. Vide supra*, p. 51.)

But a recovery had no effect upon estates derived out of, or upon charges existing as incumbrances upon, the estate tail. (1 Prest. Conv. 141, 142; 3 Prest. Abstr. 137.)

Tenant in tail after possibility.

Tenant in tail after possibility of issue extinct could not suffer a common recovery; nor can he at the present day make any disposition under the Fines and Recoveries Act. (See sect. 18.) But he has, when his estate is in possession, the powers conferred upon a tenant for life under the Settled Land Act, 1882. (See sect. 58, sub-sect. 1, vii, of that Act.)

Woman tenant in tail *ex provisione viri*.

By 11 Hen. 7, c. 20, recoveries by women tenants in tail *ex provisione viri* are made void. This Act is repealed, except as to settlements made before 28th August, 1833, by the Fines and Recoveries Act, s. 17. But by sect. 16 of the same Act, the same assent is made necessary to the validity of any disposition made under the Act by any such woman tenant in tail, as would have been necessary, by virtue of the repealed statute, to a fine levied or recovery suffered by her.

Where the entail is protected by statute.

By the 34 & 35 Hen. 8, c. 20, no recovery suffered by any tenant in tail of lands whereof the reversion or remainder is in the king, shall bind the heirs in tail. Nor can such a tenant in tail, or any tenant in tail who is by any other Act restrained from barring his estate tail, make any disposition under the Fines and Recoveries Act. (See sect. 18.) But when his estate is in possession, any such tenant in tail can exercise the powers conferred upon a tenant for life under the Settled Land Act, 1882; and, in case the reversion is in the crown, so as to bind the crown by such exercise. (See sect. 58, sub-sect 1, i, of that Act.)

Modern disentailing assurances. 3 & 4 Will. 4, c. 74.

The analogy of fines and recoveries has been to a considerable extent followed by the Fines and Recoveries Act; which enables every tenant in tail, whether in possession, remainder, contingency, or otherwise, after 31st December, 1833, by any assurance (other than a will) by which he could have made the disposition, if his estate were an estate at law in fee simple absolute, to dispose of for an estate in fee simple absolute, or for any less estate, the lands intailed, as against all persons claiming the lands intailed by force of any estate tail vested in the person making the disposition, and also, with the consent of

the person (if any) who under the Act is protector of the settlement, as against all persons, including the crown, whose estates are to take effect after or in defeasance of any such estate tail. (See sects. 15, 34 and 40 of that Act.) Such consent is not needed, if the tenant in tail is also entitled to an immediate remainder or reversion in fee. (Sect. 34.) Here the word *fee* means *fee simple*.

The estate tail will not be barred, except in so far as the disposition effectually passes an estate to the grantee. In cases where the grantee has power to disclaim the estate, his subsequent disclaimer will prevent the disposition from having any effect under the Act. (*Peacock* v. *Eastland*, L. R. 10 Eq. 17.)

The utmost effect of a disentailing assurance.

The phrase, *whose estates are to take effect after or in defeasance of* the estate tail, is not applicable to persons coming in by title paramount; and therefore the utmost operation of every disentailing assurance is confined to barring estates arising under the settlement, together with the reversion, if any, upon such estates. It follows, that no greater estate can be gained by any disentailing assurance, than could by possibility have been made by the settlor by whom the estate tail was created. In this respect, the operation of a modern disentailing assurance is exactly co-extensive with the operation of a common recovery.

The disentailing assurance will have this, its utmost possible operation, in each of the following cases:—

(1) If the tenant in tail by whom it is made is tenant in tail in possession; or

(2) If, though not in possession, he is entitled to the immediate remainder, or reversion in fee simple upon his estate tail; or

(3) If, though he is neither in possession nor entitled to the immediate remainder or reversion in fee simple, the disentailing assurance is made with the consent of the protector of the settlement. Such consent must be given either by the same assurance, or by a deed to be executed on or before the day on which the assurance is made. (Sect. 42.)

In all other cases the assurance will bar only the estate tail, and thus create a base fee.

The Protector of the Settlement under the Fines and Recoveries Act.

General definition of the protector.

In general, the protector of the settlement is the owner of the first estate for years determinable on the dropping of a life or lives or other greater estate—such estate not being held under a lease at a rent—which is prior to the estate tail, and is subsisting under the same settlement, or is confirmed or restored by the same settlement. (Sects. 22, 25, 26.)

Here the word *owner* means the *beneficial owner*. (*Re Dudson's Contract*, 8 Ch. D. 628.) But that case decides nothing with regard to a conflict of claims arising between the owner of the legal estate and the owner of the equitable estate, or the person having the right to receive the rents and profits through trustees; because all the estates in that case were equitable.

Such owner remains protector, notwithstanding any incumbrances upon, or absolute disposition of, his estate, and notwithstanding his bankruptcy or insolvency. (Sect. 22.)

Estate by the curtesy, and by resulting use.

An estate by the curtesy taken by a husband in respect of any estate created by the settlement, may be a prior estate within the meaning of the preceding paragraph. (Sect. 22.) So also may an estate which vests in the settlor by way of resulting use. (*Ibid.*)

Tenants in dower, bare trustees, heirs, executors, administrators, and assigns excluded.

But no tenant in dower, and (except in the case provided for by sect. 31) no bare trustee, or heir, executor, administrator, or assign, can be protector in respect of any estate taken in any of such capacities respectively. (Sect. 27.)

The case of a bare trustee in sect. 31 refers only to settlements made before 28th August, 1883. The mention of the heir, executor, and administrator seems to refer to an estate taken either by special occupancy or by virtue of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 6, upon the death of the owner of an estate *pur autre vie* who in his lifetime had been protector. The enactment respecting the assign imports that no person who is protector can, by any absolute disposition of his estate made after the commencement of the Act, convey the protector-

ship to an assignee; which supplements the provision of sect. 22, that the protector shall continue to be protector although his estate may have been absolutely disposed of. As to assignments of the prior estate, made before the commencement of the Act, see sect. 29.

In ascertaining which estate qualifies the protector, in any case coming within the foregoing provisions, the estate which is thereby excluded is deemed to be non-existent, and the next subsequent estate (being such as to fulfil the relevant conditions) is the qualifying estate. (See sect. 28.)

Concurrent owners.

If there are concurrent owners of the prior estate, each is sole protector to the extent of such undivided share as he could dispose of. (Sect. 23.)

Special protectors appointed by settlor.

The settlor may by the settlement appoint any number of persons *in esse*, not exceeding three and not being aliens, to be protector; and may insert a power to fill up vacancies occurring by death or retirement. (Sect. 32.) The person who would otherwise (as owner of the prior estate) be the protector, may be one of such persons. (*Ibid.*) Any person or persons who may be appointed under such a power of filling up vacancies, jointly with any person continuing in the office of protector, seem together to constitute the protector. (*Ibid.*)

Trustee of executory settlement may appoint protector.

If a settlor directs a settlement to be made instead of making it, the trustee upon whom devolves the duty of making the settlement is the settlor for the purposes of sect. 32 of the Act; and the court will not, without good reason, interfere with his discretion to appoint a protector. (*Per* Shadwell, V.-C., *Bankes* v. *Le Despencer*, 11 Sim. 508, at p. 527.)

Disclaimers and appointments must be by deed inrolled.

A person so appointed may relinquish the office by deed inrolled in chancery within six calendar months after its execution. (Sect. 32.) During a partial vacancy the survivors may act. (*Bell* v. *Holtby*, L. R. 15 Eq. 178.) New appointments under the power must likewise be made by deed inrolled. (Sect. 32.)

During a total vacancy of the special protectors,

If a total vacancy of the persons so appointed shall take place by death or relinquishment, the person who would otherwise be protector, may, during such vacancy, act as sole protector, unless

the settlor shall otherwise direct. (Sect. 32. And see *Clarke* v. *Chamberlin*, 16 Ch. D. 176.)

the general protector may act.

If the settlor declares in the settlement that the person who, as owner of a prior estate, would be entitled to be protector, shall not be protector, but omits to appoint any person to be protector in his stead, then the Court of Chancery (now the Chancery Division) is the protector, as to the lands in which such estate is subsisting and during the continuance of the estate. (Sect. 33.)

Where settlor excludes the general protector and appoints no substitute.

As to the transfer of jurisdiction, see 36 & 37 Vict. c. 66, ss. 16, 34.)

Husband and wife jointly are the protector, in respect of an estate which would have qualified the wife, if sole; unless it is settled, or agreed or directed to be settled, by the settlement, to her separate use, in which case she alone is the protector. (Sect. 24.)

Married woman protector.

The Married Women's Property Act, 1882, does not seem to make the concurrence of the husband as protector unnecessary, in any case in which it would have been necessary if that Act had not been passed; because the only cases specified in the Fines and Recoveries Act, s. 24, in which the concurrence of the husband is not required, in respect of a prior estate which would have qualified the wife, if single, to be the protector, are cases in which the prior estate is *by the settlement* either settled, or agreed or directed to be settled, to her separate use. But the question does not appear to have been foreseen, and it must be answered with some caution.

The concurrence of a husband who is under disability or living apart from his wife, may be dispensed with by an order of the Court of Common Pleas (now the Queen's Bench Division) unless the Lord Chancellor, or the Court in Lunacy, is protector of the settlement in lieu of the husband. (Sect. 91.)

Husband's concurrence, how may be dispensed with.

As to the transfer of jurisdiction, see 36 & 37 Vict. c. 66, ss. 16, 34; and the Order in Council, dated 16th December, 1880, for the consolidation and union of certain Divisions of the High Court of Justice.

Special provision is also made for the following cases of disability:—

Special cases of disability.

Lunatic.

(1.) If the protector is a lunatic, an idiot, or a person of unsound mind, the Court in Lunacy is protector in his stead. (Sect. 33. And see, as to the jurisdiction, 15 & 16 Vict. c. 87, s. 15; 14 & 15 Vict. c. 83, s. 13.)

(2.) If any person—

Traitor or felon.

(i.) being protector, is convicted of treason or felony; or

When special protector is an infant;

(ii.) not being the owner of a prior estate, is protector (that is, has been appointed protector by the settlor, under sect. 32) and is an infant; or

or his existence is uncertain.

(iii.) if it is uncertain whether any such last-mentioned person is living or dead: then

the Court of Chancery is protector in such person's stead. (Sect. 33.) Though the case of a person convicted of treason or felony is only referred to in the section, and no express provision is made to meet it, the section extends to such cases. (*Re Wainewright*, 1 Phill. 258; *Re Gravenor*, 1 De G. & Sm. 700.)

Where the prior estate has been assigned, or mortgaged, before 31st Dec. 1833.

An assignment, or mortgage, of a prior estate made before 31st December, 1833, will make the assignee, or mortgagee, protector, if and so long as it makes him the proper person, if this Act had not been passed, to have made the tenant to the *præcipe* for suffering a common recovery. (See sect. 29.)

The "proper person" here contemplated is, in general, the person actually seised of the immediate freehold; but, in cases where the lands are held by a lessee for lives at a rent, the "proper person" seems to be either the person actually seised of the immediate freehold, or (until after the repeal, in 1867, of the next cited statute) the person who, by 14 Geo. 2, c. 20, s. 2, was enabled, in such cases, to make a substituted tenant to the *præcipe*. (*Vide supra*, p. 251.)

The Act gives no fresh power to destroy charges and conveyances of remainders and rever-

If the owner of a remainder or reversion in fee simple upon a fee tail, has charged or conveyed away such remainder or reversion before 31st December, 1833, and is the person who would, by the preceding rules, be the protector of the settlement, and would be enabled to concur as such protector in barring such

remainder or reversion, but could not have effected the same end without having become such protector, then the person who, if the Act had not been passed, would be the proper person to have made a tenant to the *præcipe*, is the protector of the settlement. (Sect. 30.)

sions in fee, made before 31st Dec. 1833.

But for this provision, remaindermen and reversioners would in certain cases have acquired, under the Act, a larger or further capacity to concur in destroying, or making nugatory, charges and conveyances of their estates in remainder or reversion, than they would otherwise have had.

Under a settlement made before 28th August, 1833, a bare trustee is protector if and so long as he would have been the proper person, if this Act had not been passed, to make the tenant to the *præcipe*. (Sect. 31.)

Bare trustee, under settlement made before 28th August, 1833.

The obscure phrase "bare trustee" was probably meant to refer only to trustees to preserve contingent remainders, in cases where the preceding tenant for life under the settlement took only a term of years without impeachment of waste, determinable upon the dropping of his own life. In such a case the immediate freehold would be in the trustees, and they would, in general, have been the proper persons, if the Fines and Recoveries Act had not been passed, to make the tenant to the *præcipe* for suffering a common recovery.

Meaning of *bare trustee*.

The same phrase is also found in the Vendor and Purchaser Act, 1874, 37 & 38 Vict. c. 78, s. 5, and the Land Transfer Act, 1875, 38 & 39 Vict. c. 87, s. 48, where its meaning is scarcely elucidated by the *dicta* contained in the cases of *Christie* v. *Ovington*, 1 Ch. D. 279, and *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582.

Assurances not operating under the Act.

No disposition made under the Fines and Recoveries Act by a tenant in tail (except a lease for not more than twenty-one years, to commence in possession or within twelve months from the date, at a rent not less than five-sixths of a rack-rent) has any operation under the Act, unless it is inrolled in the Court

of Chancery (now the Chancery Division) within six months after its execution. (Sect. 41.)

It follows that the operation of any assurance by tenant in tail, wanting inrolment, remains the same now as it would have been before the Act.

Such assurances create a voidable base fee.

It is now clearly settled that by such conveyance, if purporting to convey the whole estate of the tenant in tail, the assign takes a base fee, liable to be determined, after the death of the tenant in tail, by the entry of the issue in tail. (*Machil* v. *Clark*, 2 Salk. 619, 2 Ld. Raym. 778, 7 Mod, 18, overruling *Tooke* v. *Glasscock*, 1 Saund. 260. See also *Goodright* v. *Mead*, 3 Burr. 1703; *Doe* v. *Rivers*, 7 T. R. 276; *Doe* v. *Whichelo*, 8 T. R. 211.) The words in Litt. sects. 613, 650, which seem to import that the assign takes an estate *pur autre vie* only, must be understood to mean, that his estate is liable to be determined upon an event which would *ipso facto* determine an estate *pur autre vie*. (See 3 Rep. 84 b; *Stone* v. *Newman*, Cro. Car. 427, at p. 429.)

That the estate of the assign is of inheritance, is proved by the fact that his wife was entitled to dower out of it, during its continuance; that is to say, until the base fee was defeated by the entry of the issue in tail. (3 Rep. 84 b; 10 Rep. 96 a.)

A defeasible base fee, created in manner aforesaid, by means of lease and release, might be confirmed by a fine levied by the releasor after the death of the releasee. (*Doe* v. *Whichelo*, 8 T. R. 211. See also as to a recovery, *Stapilton* v. *Stapilton*, 1 Atk. 2; though the question rather referred to the validity of a covenant to suffer a recovery than to the effect of the recovery if suffered.)

Modern Statutory Powers.

The Settled Estates Act.

There is no doubt that a tenant in tail, whether legal or equitable, has power, by virtue of sect. 46 of the Settled Estates Act, 1877, to make such leases of the settled land as are therein specified. But that enactment confers upon a legal tenant in tail no power which he might not exercise by virtue of the Fines and Recoveries Act, without being fettered by the restrictions imposed by the Settled Estates Act. These restrictions were

designed with a view to leases granted by the other persons having less estates than a tenant in tail, who are empowered to grant leases by the same enactment.

The Settled Land Act, 1882.

A tenant in tail, when his estate is in possession, has the powers conferred upon a tenant for life under a settlement by the Settled Land Act, 1882. This provision includes a tenant in tail after possibility of issue extinct; also a tenant in tail who is restrained by statute from barring his estate tail, and although the reversion is in the crown, but not a tenant in tail so restrained in respect of land purchased with money provided by parliament in consideration of public services. (See sect. 58, sub-s. 1, i, and vii, of the Act.)

A list of the last-mentioned powers will be found at the close of Chapter XXIII., *infra*.

Although these powers comprise a power of sale, and the tenant in tail may, by virtue of sect. 20 of the Act, execute assurances which are effectual to pass to a purchaser the land discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, it must not be supposed that the provisions of the Settled Land Act, 1882, in any degree render superfluous or obsolete the provisions of the Fines and Recoveries Act. Assurances executed by a tenant in tail by virtue of the Settled Land Act, 1882, have no operation to bar the entail, so far as the benefit of ownership conferred by it is concerned; but only transfer its operation, by virtue of sect. 22, to the proceeds of the sale, and the investments representing the same.

CHAPTER XXII.

BASE FEES.

The general definition of a base fee.

THE earliest (not to say the only) attempt to define the term *base fee* with which the present writer is acquainted, is that given by Plowden;* and his definition is substantially as follows:—A base fee is a fee descendible to the heirs general, upon which subsists a remainder or reversion in fee simple. Here the descent to the heirs general distinguishes it from a fee tail, where the descent is to the heirs of the body; and the existence in expectancy upon it of a remainder or reversion, distinguishes it from common law fees.

The conditions laid down by this definition can only be fulfilled† by the conversion of a fee tail into a fee descendible to the heirs general, by some method which does not destroy the remainder or reversion previously subsisting upon the fee tail. For no fee descendible to the heirs general which arises by mere limitation, can have subsisting upon it any remainder or reversion. (Co. Litt. 18 a.)

From these considerations it follows that a base fee is either—

(1) The estate taken by the grantee, under any assurance by a tenant in tail which is effectual to bar the issue in tail (or, at least to put the issue in tail, even after his right has accrued in possession, to a right of entry), but is ineffectual to bar the remainders (if any) or reversion expectant upon the estate tail; or

(2) When an estate tail is barred to the same extent,

* "A third estate in fee may be called a base fee, and that is, where A. has a good and absolute estate of fee simple in land, and B. has another estate of fee in the same land, which shall descend from heir to heir, but which is base in respect of the fee of A., as being younger than the fee of A., and not of absolute perpetuity as the fee of A. is." Plowd. 557. He proceeds to specify the case of a tenant in tail attainted of high treason.

† Unless the case mentioned at the end of the chapter is an exception to the rule.

but by the mere operation of law without the execution of any assurance, a base fee is the estate taken by the person entitled to the benefit of such legal bar.

It is believed that the following attempt is the first ever made to give a complete list of the methods by which a base fee may now arise, or might formerly have arisen:—

List of Base Fees.

(1) Before the Fines and Recoveries Act a base fee in lands might have arisen by the operation of a fine levied by a tenant in tail, who was not also entitled to the remainder, or reversion, in fee simple expectant on the estate tail.

The operation of the fine barred not only the issue of the person by whom it was levied, but all issue inheritable under the entail. (1 Prest. Est. 437, 438.)

(2) A base fee in lands may now, under the Fines and Recoveries Act, arise by the operation of an assurance made by a tenant in tail, which is insufficient to bar the remainder, or reversion, upon the estate tail, but is sufficient to bar the issue in tail. (*Vide supra*, p. 256.)

(3) A rentcharge is a tenement; and therefore a rentcharge which is already *in esse* under a limitation in fee simple, admits of being intailed within the statute *De Donis*. A tenant in tail of a rentcharge under such an entail might formerly, by suffering a common recovery, have obtained a fee simple of the rentcharge, in all cases in which, if he had been a tenant in tail of lands, he might have obtained a fee simple of the lands. But a tenant in tail of a rentcharge may also be made *de novo* upon the limitation of the rent itself, and without the creation of any remainder over in fee simple. Such a tenant in tail stands in a different position from that of a tenant in tail subsisting under an entail of a rentcharge which was *in esse* as a fee simple before the making of the entail.

By suffering a common recovery, he did not acquire a fee simple, but only barred the issue inheritable under the entail; that is to say, he acquired a base fee; and, upon a failure of issue so inheritable, the rent became extinguished in the land. (Butl. n. 2 on Co. Litt. 298 a; 1 Prest. Conv. 3.)

(4) It is conceived that, at the present day, any disentailing assurance executed by a tenant in tail of a rentcharge created *de novo* as above mentioned, which purports to create a fee simple, would create a base fee.

(5) At common law, before the passing of 34 & 35 Hen. 8, c. 20, a base fee in lands might have arisen by the operation of a common recovery suffered by a tenant in tail, when the remainder, or reversion, in fee simple expectant on the estate tail, was vested in the crown. Under such circumstances the recovery would have barred the issue in tail, but not the crown, by reason of the crown's prerogative. (Dy. 32 a, pl. 1.)

The last-mentioned statute enacted, that such a recovery should not bind the heirs in tail, nor can such tenants in tail now make any disposition under the Fines and Recoveries Act.

(6) During the interval which elapsed between the 26 Hen. 8, c. 13, whereby fees tail were made liable to forfeiture for high treason, and the 33 & 34 Vict. c. 23, whereby forfeiture was abolished, a base fee in lands would have arisen, in favour of the crown, upon the attainder of a tenant in tail for high treason, which endured so long as there was in existence either the donee in tail or any issue capable of having inherited under the entail. (*Walsingham's Case*, Plowd. 547, see p. 557; *Stone* v. *Newman*, Cro. Car. 427.)

(7) Before the extinction of villenage, if lands had been given in fee tail to a villein, the lord of the villein would have acquired, by entry upon the lands, a base fee contermi-

nous with what would have been the duration of the fee tail if it had remained in the villein and his heirs inheritable under the entail. (Co. Litt. 18 a.) If the lord had subsequently enfranchised the villein, the enfranchisement would not have affected the duration of the base fee. (*Ibid.* 117 a.)

(8) Similarly if, before the Naturalization Act, 1870, 33 & 34 Vict. c. 14, s. 2, lands had been given in fee tail to an alien, and had been seized on the part of the crown after office found, a base fee would have been vested in the crown. If the alien had subsequently been made a denizen, this would not have affected the duration of the base fee. (Co. Litt. 117 a.)

The last-mentioned Act enacts, that real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born subject.

This kind of estate, therefore, endures so long only as there is in existence either the donee in tail or any issue inheritable by force of the entail.

It has also been suggested (Plowd. 557) that, under certain circumstances, a base fee might arise—

(9) When the issue in tail was outlawed for felony, and in the lifetime of his ancestor obtained a pardon. The result would of course be the same upon an attainder by judgment. In such a case it has been suggested that the heir of the donor could not enter, because there was still living issue of the donee; and the issue could not lawfully enter under the entail, for want of inheritable blood, which was not restored by the pardon. In the case referred to by Plowden, the issue entered; and some thought that he had gained by his entry a base fee conterminous with the entail, but others thought that he had gained only an estate for his own life.

Base fees of any of the kinds above described are not properly

said to be liable to be determined,—which phrase properly refers to the voluntary assertion of a hostile claim,—though they are determinable upon the happening of the event which would have determined the estate tail in which they had their origin. There exists one other species of base fee, which is not only determinable in the latter sense, but is, in the proper sense of the phrase, liable to be determined:—

(10) Any assurance made by a tenant in tail which purports to convey his whole estate, but is not effectual to bar the issue in tail of their right, will create a base fee liable to be determined by the entry of the issue in tail after the death of the tenant in tail who made the assurance. (*Vide supra*, p. 262.)

Determinable fee conterminous with base fee.

A doubt suggested.

An estate of the like duration with a base fee may arise as a determinable fee, by an express limitation to A. and his heirs so long as B. shall have heirs of his body. (*Vide supra*, p. 202, No. 9.) But it may be doubted whether, if B. is living at the date of the limitation, it can take effect in possession until the death of B.; because, *Nemo est heres viventis*. If this view is well founded, such a limitation during the life of B. must be by way either of executory limitation or of contingent remainder.

Discussion of the question.

The authorities do not lend much countenance to this view. The language of the "apprentice of the Middle Temple" in Plowden, who was probably Plowden himself, implies, if it is to be construed strictly, that an estate in possession might be created under such a limitation during the life of B. He lays it down that, "if land is given to a man and to his heirs, as long as J. S. shall have heirs of his body, then he to whom the land is given has a fee simple, but his estate is determinable upon the death of J. S. without issue, for then the fee is ended, and *the feoffor shall have the land again*." (Plowd. 557.) This supposes J. S. to be living at the date of the limitation. If the determinable fee had been granted by way of contingent remainder, it is not true that the feoffor would necessarily have been entitled to the land upon the death of J. S. without issue; because this event might possibly have happened during the continuance of the precedent estate.

It is possible that Plowden's attention was not directed to the point. But the same assumption seems also to have been made by Watkins, in his work on Descents, at p. 211; where he discusses a different question; namely, whether the fee (which he loosely styles a base fee) would determine absolutely by the death of B. without issue born but leaving his wife *enceinte*, or whether a subsequent birth of issue would revive it as against the person entitled in reverter. Here also, as in Plowden's case, it is not absolutely certain that Watkins' attention was directed to the point; but the inference in favour of this view is much stronger, by reason both of the greater clearness of his language and of the more direct bearing of the point upon the question which he is discussing. The other authorities seem to afford no clear inference.

The argument drawn from the maxim, *Nemo est heres viventis*, though *primâ facie* it is a very strong one, cannot be regarded as conclusive; because in the limitation of conditional fees, the words *heirs of the body* were, for some purposes, used to denote the issue during the lifetime of the ancestor. In so far as they imported a quasi-condition, the condition was fulfilled by the birth of issue during the ancestor's lifetime: a usage which bears a close resemblance to the use of the words in the limitation of this kind of determinable fees. At the same time, there seems to be no doubt that a limitation "to A. and the heirs of the body of his father," will, if the father is living, create an estate tail by way of contingent remainder, expectant upon an estate for life in A., which cannot vest until the father's death; when it will vest in the person who at that time can bring himself within the description, as heir to the body of the father, and he will take as tenant in tail by purchase. (3 Prest. Conv. 77—79.)

Merger.

At common law, a base fee would merge in the remainder or reversion in fee simple, both estates being vested in the same person without the existence of any intermediate estate. (3 Prest. Conv. 240.) Whence it followed that if a tenant in tail, having also an immediate remainder or reversion in fee simple, by a fine vested in himself a base fee, the latter estate was destroyed by merger, and all incumbrances affecting the

remainder or reversion were let in. They were technically said to be accelerated. But a purchaser could not, under the old practice, rely upon this as a valid objection against a title in fee simple depending upon a fine levied by a tenant in tail, without showing that the reversion was in fact affected by some incumbrance. (1 Prest. Abst. 7.)

By virtue of the Fines and Recoveries Act, s. 39, enlargement is now, in the case of a base fee, substituted in lieu of merger. (*Vide supra*, p. 72.)

On the descent of base fees.

It will be observed that the theory of base fees, as outlined in Plowden's definition, assumes the truth of the proposition, that when a base fee and a reversion in fee simple thereupon *subsist* at the same time in the same land (which can only be effected by operation of law and not by mere limitation or conveyance), the base fee descends "from heir to heir;" which language, since there is nothing to suggest special heirs, must mean that it descends to the heirs general.

Preston has remarked that when an estate tail was turned to a base fee by a fine, the descent of the base fee followed the common law, descending to the heir general, not to the special heir. (1 Prest. Abstr. 372; *ibid.* 404.) If the case cited by him (*Beaumont's Case*, 9 Rep. 138, 2 Inst. 681, or *Baker* v. *Willis*, Cro. Car. 476) should seem hardly to establish this proposition, it seems nevertheless to follow from the fundamental rule, that the common law heir can be displaced only by means of special limitations referring to the heirs of the body;* because, in the case supposed, no such limitation existed. The same doctrine seems necessarily to apply to all base fees which arise without express limitation. It will not necessarily apply to base fees arising by express limitation, including base fees created by the alienation of a tenant in tail in remainder, without the consent of the protector of the settlement under the Fines and Recoveries Act, ss. 15 and 34; because a base fee *so*

* "The rule of the common law is, you shall not make a person heir, or give him the character or the rights of an heir, by a special limitation, unless he be the heir by the rule of law. The statute *De Donis* gave the donor, with reference to estates tail, the power of making special heirs inheritable under the entail." 1 Prest. Est. 475.)

created might by possibility take the form of a fee tail vested in another person.

It is remarkable that the question has been little noticed. Though it of course applies to estates in tail male and tail female as well as to estates in tail general, yet it does not refer to the distinction between the heir male or female and the heir general, but to the distinction between the heir of the body (whether general, male, or female) and the heir general. It seems to have been always tacitly assumed, without the necessity for explicit mention, that when the law, whether mediately or immediately, devests a fee tail by barring the issue in tail, the novel fee thus created will, in the hands of the person entitled to the benefit of the bar, follow the ordinary course of descent prescribed by the common law, namely, to the heir general.*

Modern innovations upon the law have introduced a possibility of the existence of base fees which are not strictly comprised within the terms of Plowden's definition. A base fee created by a tenant in tail, being created by a "disposition," might possibly take the shape of a disposition in favour of a grantee in tail male or tail female. Such an estate would not descend to the heir general; but it would possess the most prominent characteristics of other base fees; being created rather by operation of law than by the act of the party, and being determinable with the failure of issue inheritable under the defeated entail.

Whether a base fee can be a fee simple absolute.

Moreover, sect. 65 of the Conveyancing Act of 1881, amended by sect. 11 of the Conveyancing Act, 1882, enacts, that the residue of any such long term of years as is therein specified may be enlarged into a fee simple, by virtue of the Act, in the manner therein prescribed. It is perhaps not clear what will become of the reversion upon the term under such circumstances. On the one hand, two fees simple cannot, by the common law, subsist at the same time in the same lands; whence might be drawn the inference, that the reversion is absolutely destroyed.

* Compare the resolution of the judges, that the Isle of Man, though no part of the kingdom, yet, being granted under the Great Seal of England to Sir John Stanley and his heirs, was descendible according to the course of the common law. (Co. Litt. 9a; 4 Inst. 284.)

On the other hand, the rule of the common law, that a reversion in fee cannot be expectant upon another fee, may be suspended by force of a statute, and it has in fact been suspended by the statute *De Donis*. The question does not appear to have been foreseen. The answer which, by the analogy of the law, it ought to receive, is doubtful; and the answer which it will in fact receive cannot be predicted with confidence. If the reversion is not destroyed by the enlargement, the fee simple obtained by the enlargement will subsist as a base fee. No other example can be suggested of a base fee which is a fee simple *absolute*. This fact might perhaps be thought to afford a sufficient reason for holding, that the reversion is destroyed by the enlargement. But the case is by no means analogous to the enlargement of a base fee effected by sect. 39 of the Fines and Recoveries Act; because in the case of a long term it is expressly enacted (Conv. Act, 1881, s. 65, subs. 4) that the fee simple acquired by enlargement shall be subject to all the same covenants and provisions relating to user and enjoyment as the term would have been subject to if it had not been so enlarged. It is possible that, in the view of its framers, this provision was intended to apply only to covenants and provisions imposed upon the term subsequently to its creation; and no doubt the modes in which such long terms have commonly arisen, makes it improbable that hitherto such covenants and provisions have been imposed upon them at the time of their creation. But the enactment contains nothing thus to restrict its meaning; which cannot, without gratuitously importing into it something which it does not in fact contain, be made to exclude covenants and provisions imposed upon a long term at the time of its creation. The present writer has been informed that, in reliance upon these considerations, the enactment has been used by some conveyancers as a device whereby to annex to a fee simple certain covenants which would not "run with the land" at common law. If this view (which seems to be more than plausible) should be supported, the person formerly entitled to the reversion, and his heirs, will be entitled to the benefit of such covenants; and this might afford a reason for holding that the reversion remains still on foot, notwithstanding the enlargement of the term.

Reasons for the affirmative conclusion.

CHAPTER XXIII.

AN ESTATE FOR THE LIFE OF THE TENANT.

UNDER the phrase *tenant for term of life*, Littleton includes both a tenant for the term of his own life and a tenant for the term of another's life, or *pur autre vie*. (Litt. sect. 56.) But the latter tenancy is distinguished by some peculiar characteristics, which make its separate treatment desirable.

To these, says Lord Coke, may be added a third, namely, for the lives of the tenant himself and of another person or persons, which limitation creates a single estate of freehold. (Co. Litt. 41 b.) If the other person or persons die in the lifetime of the tenant, this estate becomes thenceforward an estate for his life simply; but otherwise this estate becomes subject, at his death, to the peculiar characteristics of an estate *pur autre vie*.

Division of estates for life or for lives.

The following is a complete list of estates for life or lives:—

1. An estate for the life of the tenant himself, including
 - (i) Estates by express limitation, and by implication;
 - (ii) The estate of tenant in tail after possibility of issue extinct;
 - (iii) The estate of a tenant by the curtesy; and
 - (iv) The estate of a tenant in dower;
2. An estate for the life of another person, or *pur autre vie;*
3. An estate for the joint lives of several persons; and
4. An estate for the life of the longest liver of several persons.

Right to estovers.

Every tenant for life has by the common law, as incident to his estate, and without express grant, the right to take in reasonable measure three kinds of estovers—housebote (which includes firebote), ploughbote and haybote; unless he be restrained from taking them by special covenant. (Co. Litt. 41 b.) Such a covenant did not make the cutting of estovers waste, but

only rendered the tenant liable in damages on the covenant. (Dy. 198 b, pl. 53.) To cut timber so far as may be necessary for these purposes, is not waste; provided, of course, that the timber is in fact so used accordingly. (Co. Litt. 53 b.) If the tenancy arises under a settlement, the tenant's rights of user are always expressly provided for by the settlement; and in practice the tenancy for life is commonly declared to be without impeachment of waste. If the tenancy arises under a lease, the rights of the tenant are in practice provided for in the lease.

Tenant for life under a settlement, as distinguished from tenant for life under a lease at a rent.

By the common law, a tenant for life under a settlement has no rights of user, or power to deal with the land, other than those possessed by a lessee for life holding merely under a lease at a rent. But modern social arrangements have firmly established a very great difference, as to their relation to the land, between a tenant for life under a settlement and a lessee for life or lives at a rent; of whom the former is in practice the beneficial owner of the property, whose interest, either with his own consent or by the settlement of an ancestor, has been cut down to a life estate, while a tenant for life under a lease at a rent, is merely a farmer holding under a lease for life instead of a lease for years. This distinction in status was recognized by 14 Geo. 2, c. 20, which enabled the consent of a tenant under a lease to be dispensed with on occasion of suffering a common recovery. (*Vide supra*, p. 251.) The same distinction has been enforced by several subsequent statutes, and most strongly by the Settled Land Act, 1882; by which extensive powers of alienation, enfranchisement, exchange, partition, leasing, and for other purposes, are conferred upon every person beneficially entitled to possession (which in that Act includes receipt of income) of settled land under a settlement, as defined in sect. 2, sub-s. (1) of that Act. The definition there given of a settlement accords with the usual meaning of the phrase; and the definition of a tenant for life obviously includes a legal tenant for his own life, beneficially entitled in possession. A list of these statutory powers will be found at p. 282, *infra*. The following remarks will, in the absence of express mention, be restricted to such points connected with estates for life as do not seem to be affected by the statutes above referred to.

How tenancy for life may arise.

An estate for life may arise in any of the following ways:—

(1°) By express limitation to a grantee during his life;

(2°) By implication of law; where a grant is made to a grantee by name, either without any words of limitation, or accompanied by words intended to take effect as words of limitation, but not by law capable of so taking effect as to limit any greater estate;

(3°) By the assignment of an estate *pur autre vie* to *cestui que vie;* and

(4°) By operation of law, on the arising of a husband's right to curtesy, or of a widow's right to dower.

Estate for life by implication.

Any conveyance, otherwise valid and capable of taking effect, which nominates a grantee, but neither limits nor purports to limit any estate, will, in the absence of any further indication, operate by implication of law to pass an estate for the life of the grantee. (Co. Litt. 42 a; see also Litt. sect. 283.) Similarly, if the limitation is *for term of life*, without saying for whose life. (Co. Litt. 42 a.) But, in the latter case, an estate for the life of the *grantor* will pass, if the grantor might rightfully grant that estate, but could not rightfully grant for the life of the grantee. (*Ibid.* See also 183 a.) And the implication of law upon which the estate arises is liable to be rebutted by the manifestation of a contrary intention. For example, if the estate by implication should arise in the premisses of a deed, it may by the *habendum* be cut down to an estate for years, or at will; and this may happen even though the *habendum* itself be technically void as a limitation, and therefore not capable of taking effect otherwise than as a manifestation of intention. (See the 1st resolution in *Buckler's Case*, 2 Rep. 55. For further observations upon the relation between the premisses and the *habendum*, see p. 333, *infra.*)

The addition to the name of a grantee of any words designed to serve as words of limitation, not being such as, either by the common law or by sect. 51 of the Conveyancing Act of 1881, are appropriated to the limitation of a fee, will not enable the assurance to pass any estate of inheritance; and in general, will not enable the assurance to pass any greater estate than would have passed by the mere nomination of the grantee. But it has

recently been held, by the Court of Exchequer, that the addition to the name of the grantee of the words, "his executors, administrators, and assigns," in the premisses of a deed, will, when the grantor has an estate for his own life, expressly pass the whole estate of the grantor to the grantee, so as to make the *habendum*, if purporting to grant a less, or an impossible, estate, void for the inconsistency. (*Boddington* v. *Robinson*, L. R. 10 Exch. 270.) For some remarks upon this case, see p. 84, *supra*.

Curtesy.

To entitle the husband to be tenant by the curtesy of the wife's lands of inheritance after the death of the wife, the following circumstances are necessary:—

(1) That the wife be seised during the coverture of an estate of inheritance to which issue of the marriage may possibly succeed as heir to the wife (Litt. sects. 35, 52);
(2) That the estate be, or become during the coverture, an interest in possession;
(3) That seisin in deed (less properly styled actual seisin) be obtained during the coverture; and
(4) That issue be born alive.

For some remarks upon the distinction between seisin in deed and seisin in law, see p. 180, *supra*.

If the lands be subject to the custom of Kent, the curtesy is of a moiety only, and ceases on the re-marriage of the husband; but such curtesy attaches without birth of issue. (Co. Litt. 30 a; *ibid.* 111 a; and see on the subject generally, Rob. Gav. bk. ii. ch. 1.) Special custom may assign a different proportion, or the whole, to the husband.

As to seisin in deed.

The rule, that seisin in deed must be acquired during the coverture, applies in its full rigour only to lands. As regards other realty of which there is curtesy, a seisin in law suffices if circumstances make seisin in deed impossible: thus, of a rent, if the wife dies before it becomes due, or of an advowson, if she dies before the church becomes vacant. (Co. Litt. 29 a.) Entry

is not necessary to acquire seisin in deed of land, if there be a tenant for years of the land; because his possession is the possession of the husband and wife, even before the receipt of rent from him. (Harg. n. 3 on Co. Litt. 29 a; and see p. 181, *supra*.)

Lord Coke (Co. Litt. 40 a) refers the necessity for actual seisin to Littleton's words (sect. 52), that the issue must be such as may by possibility inherit *as heir to the wife:* descent being traced before the Descent Act, 3 & 4 Will. 4, c. 106, from the person last seised. It would seem to follow, if he is right, either that there is now curtesy only of lands coming to the wife by purchase, or else that actual seisin has ceased to have any relevancy to the matter.

In *Eager* v. *Furnivall*, 17 Ch. D. 115, it seems to have been assumed that the alteration of the rules of descent has not affected the necessity for actual seisin; but the point was not raised. It was also assumed, that a seisin in law of lands would suffice, when a seisin in deed could not by any possibility be had. It is to be observed, that, in *Eager* v. *Furnivall*, the impossibility arose out of a peculiar state of circumstances caused by sect. 33 of the Wills Act, and was an *absolute* impossibility; whereas, upon an actual descent at common law, there could never be an absolute impossibility to obtain seisin in deed, but only a certain degree of difficulty which, however great in practice, could not in theory be said to be insuperable.

With regard to tenure, there is this difference between curtesy and dower, that tenant by the curtesy holds immediately of the superior lord, while tenant in dower holds immediately of the heir, and is attendant on him for one-third of the services. (Watk. Desc. 104, 105.)

Equitable curtesy.

The Court of Chancery allowed to the husband a right, analogous to curtesy, which may be styled equitable curtesy, in respect of equitable estates having the same nature and *quantum* as legal estates which confer the right. (Harg. n. 6 on Co. Litt. 29 a.) The phrase equitable estates here includes an equity of redemption, see *Casborne* v. *Scarfe*, 1 Atk. 603; also trust money held upon trust for investment in land, see *Sweetapple* v. *Bindon*, 2 Vern. 536. The doubt expressed in the last-cited

case, whether curtesy should be allowed if the trust arose under marriage articles, is disposed of by *Cunningham* v. *Moody*, 1 Ves. sen. 174.

Effect of a separate use for the wife.

If the wife is entitled to her separate use, not only as regards the income but also as regards the corpus, this does not prevent the right of the husband from attaching, though it will be defeated by the wife's alienation, whether *inter vivos* or by will. (*Cooper* v. *Macdonald*, 7 Ch. D. 288; overruling *Moore* v. *Webster*, L. R. 3 Eq. 267.) An express declaration contained in the settlement, that the husband "shall not be tenant by the curtesy," will exclude his right altogether; even though the legal estate be in the wife. (*Bennet* v. *Davis*, 2 P. Wms. 316.)

So far as alienation is concerned, the power of a wife entitled for an estate of inheritance to her separate use, to defeat her husband's curtesy, seems to be the same as the power of a husband under the Dower Act, 3 & 4 Will. 4, c. 105, to defeat his wife's dower. But it does not appear that a wife could, by a mere declaration of intention, without making any disposition of the estate, defeat her husband's curtesy.

The Married Women's Property Act, 1882.

By the Married Women's Property Act, 1882, ss. 2, 5, all property of women married after the commencement of the Act, and property of women married before that date, the title to which shall accrue after that date, is placed upon a novel footing. But it is not clear that these provisions make any further change in the law affecting curtesy, than to put all curtesy (except of estates the title to which may have devolved upon a married woman before the Act's commencement, which remain unaffected) upon the same footing as equitable curtesy in cases where, before the Act's commencement, the wife was entitled to both income and corpus to her separate use. The Act seems to aim at raising a separate use for a married woman by implication of law and without the intervention of a trustee; which has not necessarily any wider operation than a separate use raised by contract. But the question does not appear to have been foreseen; and, so far as regards estates belonging to women married after the Act's commencement, and estates coming to women previously married by a subsequently-accruing title, it must be answered with some caution.

A tenant by the curtesy is enumerated among the persons upon whom, when their respective estates or interests are in possession, the statutory powers of a tenant for life are conferred by the Settled Land Act, 1882. (See sect. 58, sub-s. 1, viii, of that Act.) But sub-s. (2) of the same section enacted, with regard to each of the persons thereinbefore mentioned, that the provisions of the Act referring to a settlement, and to settled land, should extend to the instrument under which such person's estate or interest arises, and to the land therein comprised. The enactment seems therefore to have no meaning in relation to tenants by the curtesy, because the estate of a tenant by the curtesy does not arise "under" any "instrument," but by virtue either of the common law or of a special custom. The Settled Land Act, 1884, s. 8, enacts that, for the purposes of the Settled Land Act, 1882, the estate of a tenant by the curtesy shall be deemed to be an estate arising under a settlement made by his wife. This enactment does not say when the settlement shall be deemed to have been made, or what it shall be deemed to comprise. Statutory powers.

Dower.

There formerly existed three kinds of dower other than dower at common law; including under the phrase, *dower at common law*, dower out of lands held by common law tenure, but of which, by special custom, some other proportion than one-third part is assigned for dower. Two of the three, dower *ad ostium ecclesiæ* (*sive monasterii*) and dower *ex assensu patris* (Litt. sect. 38), were abolished by the Dower Act, 3 & 4 Will. 4, c. 105, s. 13. The third kind, dower *de la pluis beale* (Litt. sect. 48), which depended for its existence upon the distinction between tenure in chivalry and tenure in socage, was practically abolished with the abolition of tenure in chivalry by 12 Car. 2, c. 24. Various species of dower.

Dower at common law is of a third part of all tenements of which the husband was solely seised, whether in deed or in law, at any time during the coverture, for an estate of inheritance to which issue of the wife by the husband might by possibility Dower at common law.

inherit; but such issue need not be born. (Litt. sect. 36.) The wife is dowable of a fee tail, even though it should be determined by the death of the husband without issue. (Perk. sect. 317.) By local custom dower may be of a half, or the whole. (Litt. sect. 37.) In that case, it is more properly styled dower by local or special custom. (2 Bl. Com. 132.) If the lands be subject to the custom of Kent, the dower is of a moiety, and ceases on re-marriage or fornication. (Rob. Gav. pp. 205, 206.) But dower by special custom must be carefully distinguished from dower out of lands held by customary tenure for customary estates of inheritance, usually styled *freebench*.

By special custom.

Freebench.

A wife is not dowable of a fee of which the husband was seised as joint tenant with others. (Co. Litt. 31 b.) But the undivided shares of tenants in common are, for all purposes except physical possession, separate tenements, of which they respectively are solely seised; and therefore dower may be claimed of such undivided shares.

Joint tenants and tenants in common.

Although the husband was allowed equitable curtesy of equitable estates, the wife was not allowed equitable dower. (*Godwin* v. *Winsmore*, 2 Atk. 525.)

For some time after that the right of the mortgagor to redeem a mortgage in fee simple had been established in equity, it was considered that, when the mortgagee's estate had become absolute at law by default of payment on the stipulated day, the mortgagor could not, by redeeming, defeat the right of the wife of the mortgagee to dower; because her right had attached at law immediately upon her husband's estate becoming absolute at law. This was one reason of the introduction of mortgages for long terms of years instead of in fee simple. (Butl. n. 1 on Co. Litt. 205 a.) It is now regarded as an axiom in equity, that redemption defeats the claim of the mortgagee's wife to dower.

Wife of mortgagee now not entitled to dower after redemption.

When the husband's fee, by virtue of which the wife claims dower, is liable to be defeated by the exercise of a power vested in the husband, such an exercise of the power will defeat the wife's right to dower. (*Ray* v. *Pung*, 5 Madd. 310, 5 B. & Ald. 561.)

The dower of all women married after 1st January, 1834, is

now regulated by the Dower Act, 3 & 4 Will. 4, c. 105, which gives the wife, in addition to her common law dower, a right to dower out of equitable estates of inheritance in possession (sect. 2), and also out of estates as to which the husband had only a right of action (sect. 3). But it makes the wife's claim to dower subject to all partial estates and interests, and all charges created by any disposition or will of her husband, and all debts, incumbrances, contracts, and engagements to which his land is subject or liable (sect. 5); and subject also to any conditions, restrictions, and directions contained in his will (sect. 8); and it enables the husband wholly to defeat her right to dower, whether at common law or by virtue of the statute, by any of the following means:— Provisions of 3 & 4 Will. 4, c. 105.

1. By absolutely disposing of the lands in his lifetime. (Sect. 4.)
2. Or absolutely disposing of the lands by his will. (*Ibid.*)
3. By a declaration contained in the deed by which the land was conveyed to him, that his wife shall not be entitled to dower out of such land. (Sect. 6.)
4. By a like declaration contained in any deed executed by him. (*Ibid.*)
5. By a like declaration contained in his will. (Sect. 7.)
6. By devising to or for the benefit of his widow, any land, or any estate or interest therein, out of which she would otherwise be entitled to dower. (Sect. 9.)

 But a gift of personal estate, or of land not subject to dower, does not prejudice her right. (Sect. 10.)

The provisions of this Act do not extend to copyholds. (*Powdrell* v. *Jones*, 2 Sm. & Giff. 407; *Smith* v. *Adams*, 5 De G. M. & G. 712.)

Tenant in dower is perhaps the only "limited owner" upon whom no powers are conferred by the Settled Land Act, 1882.

Statutory Powers.

Certain powers of leasing are conferred upon a tenant for life, beneficially entitled to possession or receipt of rents and profits, by the Settled Estates Act, 1877, s. 46; but it is not probable Settled Estates Act, 1877.

that these powers will in future be used in practice. Larger powers of leasing are conferred by the Settled Land Act, 1882, ss. 6—12; and the latter powers are now, by the Settled Land Act, 1884, s. 5, in a very great measure freed from the inconvenience attending the provisions respecting the giving of notices, contained in the Settled Land Act, 1882, s. 45. There seems now to be no motive for resorting to the powers conferred by the Settled Estates Act, 1877, in preference to those conferred by the Settled Land Act, 1882.

Settled Land Act, 1882.

The following powers are, by the Settled Land Act, 1882, conferred upon, or made exerciseable by, a variety of persons, or classes of persons, described or enumerated in sect. 2, sub-s. (5), sect. 58, sub-s. (1), and sects. 60—63,* of that Act. The typical donee of these powers is "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life." (Sect. 2, sub-s. 5.)

Sale.

(1) A power to sell the settled land, or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same. (Sect. 3, sub-s. i.)

But the principal mansion house, and the lands usually occupied therewith, cannot be sold without the consent of the trustees or an order of the court. (Sect. 15.)

Release of services and enfranchisement.

(2) A power, where the settlement comprises a manor, to sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without the minerals and mining rights, so as, in every such case, to effect an enfranchisement. (Sect. 3, sub-s. ii.) This seems to mean, that he may enfranchise copyholds, parcel of the manor, and release the tenure (thereby extinguishing the services) of freeholds, held of the manor.

An enfranchisement may be made with or without a re-grant of any right of common or other right, easement

* The provisions of sect. 63 are amended by the Settled Land Act, 1884, ss. 6, 7. These provisions do not refer to a tenant for life in the ordinary meaning of the phrase.

Settled Land Act, 1882.

or privilege theretofore enjoyed with the land enfranchised. (Sect. 4, sub-s. 7.) Rights of common in the wastes of the manor are extinguished at law by enfranchisement, unless specially preserved by the use of terms equivalent to a re-grant of the common. (1 Watk. Cop. 451.) They are not extinguished in equity. (*Styant* v. *Staker*, 2 Vern. 250.) Nor will an enfranchisement effected under 4 & 5 Vict. c. 35 (see s. 81), and 15 & 16 Vict. c. 51 (see s. 45), deprive the tenant of any commonable right to which he may be entitled.

Exchange.

(3) A power to make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange. (Sect. 3, sub-s. iii.)

Settled land in England cannot be given in exchange for land out of England. (Sect. 4, sub-s. 8.)

Partition.

(4.) A power, where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, to concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition. (Sect. 3, sub-s. iv.)

Money required for enfranchisement, or for equality of exchange or partition, may be raised by mortgage of the settled land or any part thereof. (Sect. 18.)

Shifting of incumbrances.

(5.) A power, with the consent of the incumbrancer, to charge an incumbrance affecting land sold, or given in exchange or on partition, on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold, or so given. (Sect. 5.)

Leasing.

(6.) A power to lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, on building lease for any term not exceeding ninety-nine years; on mining lease, for any term not exceeding sixty years; and on any other kind of lease, for any term not exceeding twenty-one years. (Sect. 6.)

With permission of the court, to be given under special

Settled Land Act, 1882.

circumstances, a building or mining lease may be made for any term, or may be granted in perpetuity. (Sect. 10.)

But the principal mansion house, and the lands usually occupied therewith, cannot be leased without the consent of the trustees or an order of the court. (Sect. 15.)

Leases made under this power must comply with the following conditions (sect. 7):—

(i.) Every lease must be made by deed, to take effect in possession not later than twelve months after its date;

(ii.) And must be at the best rent, regard being had to any fine taken and other circumstances;

(iii.) The lessee must covenant to pay the rent, with a condition of re-entry upon default for a time not exceeding thirty days;

(iv.) A counterpart must be executed by the lessee.

Confirmation of contracts.

(7.) A power (sect. 12):—

(i.) To give effect to a contract for a lease entered into by any of his predecessors in title, where such lease, if made by the predecessor, would have bound the successors in title;

(ii.) To give effect to a covenant for renewal, performance whereof could be enforced against the owner for the time being of the settled land;

(iii.) To confirm, "as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted under the Act or otherwise, as the case may require."

Accepting surrenders.

(8.) A power to accept, with or without consideration, a surrender of any lease, whether made under the Act or not; and such surrender may relate to the whole, or any part, of the land comprised in the lease. On a partial surrender, the rent may be apportioned; and on the grant of a new lease, the value of the lessee's interest under the surrendered lease may be taken into account in fixing the rent. (Sect. 13.)

(9.) A power to license copyholders of any manor comprised in the settlement, to make any such leases of their copyhold lands as the tenant for life is by the Act empowered to make of freehold land. (Sect. 14.) It seems that the leasing powers of the tenant for life extend to copyholds only so far as their exercise accords with the custom of the manor. Licenses to lease copyholds.

(10.) A power, in connection with a sale or lease for building purposes, to cause to be appropriated and laid out, for the general benefit of the residents on the settled land, any parts thereof for streets, gardens, or other open spaces, with drains, fencing, paving, or other works necessary or proper in connection therewith; and also to make arrangements for their continued repair and maintenance. (Sect. 16.) Appropriation of streets, &c.

(11.) A power, if impeachable for waste in respect of timber, on obtaining the consent of the trustees or an order of the court, to cut and sell timber ripe and fit for cutting. (Sect. 35.) Cutting timber.

(12.) A power to make, vary, or rescind, with or without consideration, and accept surrenders of, contracts for carrying into effect any of the purposes of the Act. (Sect. 31.) Contracts.

(13.) A power, where personal chattels are settled on trust to devolve with land so as ultimately to vest in some person attaining an estate of inheritance therein, to sell such chattels on obtaining an order of the court. (Sect. 37.) Sale of quasi-heirlooms.

It is the general effect of the foregoing powers, to liberate the settled land, so far as the exercise of any particular power extends, from the limitations and trusts of the settlement, and to transfer their operation to the money, investments, lands, or other net proceeds, obtained by exercising the power. Thus the Act does not in general destroy the settlement, but only alters the subject upon which it operates.

CHAPTER XXIV.

ESTATES PUR AUTRE VIE.

So far as regards its *quantum*, an estate *pur autre vie* may be limited to endure (1) during the life of a single person; or (2) during the joint lives of several persons; or (3) during the life of the longest liver of several persons. In the following remarks the word *life* will, for brevity, be used to include *lives*.

Every tenant *pur autre vie* has, by common law, the same right to estovers as a tenant for his own life. (Co. Litt. 41 b.)

By the common law, a tenant *pur autre vie* holding under a settlement has no rights of user, or power to deal with the land, other than those possessed by a lessee *pur autre vie* holding merely under a lease at a rent. But by the Settled Land Act, 1882, s. 58, subs. (1), (v.), a tenant *pur autre vie*, not holding merely under a lease at a rent, has, when his estate is in possession, the powers conferred by that Act upon a tenant for life under a settlement.

Methods by which the estate may arise.

So far as regards its origin, an estate *pur autre vie* may arise in any of three several ways:—

(1) By express limitation, which is either to a grantee simply, during the life of *cestui que vie*, or to a grantee and his heirs, during such life.

When the Statute of Frauds had cast the estate, in default of a devisee or special occupant, upon the executors or administrators of a deceased tenant *pur autre vie*, a practice sprang up of limiting the estate to the executors or administrators instead of to the heirs.

(2) By the assignment to another person of an existing estate for life, which latter estate may have arisen either by act of parties, or by operation of law, as curtesy or dower; and the assignment is, like the express limitation, either to the grantee simply, or to him and his heirs, during the life of *cestui que vie*.

(3) By operation of law, when, before the abolition of forfeiture by 33 & 34 Vict. c. 60, an estate for the term of the life of an attainted traitor, who was entitled to an estate for his own life, was by forfeiture cast upon the king; or when, before the practical abolition of general occupancy by the Statute of Frauds, an estate for the term of the life of another person was, upon the death of a tenant *pur autre vie*, cast upon the general occupant in manner hereinafter mentioned; or, since that statute, upon the executor or administrator of the deceased tenant *pur autre vie*.

For the purpose of creating an estate *pur autre vie* by assignment, the estate of tenant in tail after possibility of issue extinct does not differ from an estate for life. (3 Prest. Conv. 171, 172.) The assign is punishable for waste. (Co. Litt. 28 a; 2 Inst. 302.)

Heirs as special occupants.

When an estate *pur autre vie* arises either *de novo* by express limitation, or by the assignment of an existing estate for life, the omission to specify the heirs in the grant has still an important influence upon the transmission of the estate upon the death of the tenant in the lifetime of *cestui que vie*.

It will be observed that, in external form, the limitation to a grantee and his heirs, during the life of *cestui que vie*, resembles the limitation of a determinable fee. But because the event which is to determine the estate is not such as may by possibility never happen, no fee arises. In a determinable limitation, the determining clause must not be radically inconsistent with the preceding limitation, which is subject to it; that is to say, the determination must be only possible, not certain, so that by possibility the preceding limitation may endure throughout its whole possible extent.

It follows, that the word *heirs* when used in this sense is not properly a word of limitation. By virtue of the grant, the heir of the tenant *pur autre vie* has, on the death of his ancestor in the lifetime of *cestui que vie*, a right of entry; but the right does not descend to him as heir. It devolves upon him by the peculiar title styled *occupancy;* which in the case of the heir is styled *special* occupancy, to distinguish it from the *general* occu-

pancy which formerly existed upon the death of a tenant *pur autre vie*, leaving no special occupant. This title accrues to the heir by reason of his being named in the grant, and not by any title of inheritance. And similarly, when an estate *pur autre vie* is made the subject of a quasi-entail, purporting to be limited to one and the heirs of his body, such special heirs do not take by descent, and the words are not properly words of limitation, but only words nominating a succession of special occupants. (*Low* v. *Burron*, 3 P. Wms. 262.) Until the Statute of Frauds made the estate in the hands of the heir as special occupant, assets to the same extent as a fee simple, no action lay against the heir upon his ancestor's bond specifying the heirs.*

General occupancy.

But when the heir is not named in the grant, he has no better title by occupancy than any one else; and, by the common law, if the possession was vacant at the death of the tenant *pur autre vie*, any stranger who first entered gained the freehold for the residue of the life of *cestui que vie*, by the title of *general occupancy*, and he was styled the general occupant.† (Co. Litt. 41 b.) If the possession was not vacant, the law cast the freehold, with the like title and style, upon the person in possession (1 Prest. Est. 259); such as the tenant for years, or at will, of the tenant *pur autre vie*. There was no general occupancy of copyholds, because the seisin of them is in the lord. (*Zouch* v. *Forse*, 7 East, 186.)

Who may be special occupants.

Though the heir took as special occupant by the nomination of the grantor and not by inheritance, it seems to be the better opinion that the heir alone, and not the executor or adminis-

* "Such estates certainly are not estates of inheritance. They have been sometimes called, though improperly, descendible freeholds. Strictly speaking, they are not descendible freeholds, because the heir-at-law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have pleaded *riens per descent;* for these estates were not liable to the debts of the ancestor before the Statute of Frauds." Lord Kenyon, in *Doe* v. *Luxton*, 6 T. R. 289, at p. 291. In *Seymor's Case*, 10 Rep. 95, at p. 98a, they are said to be descendible, but not of inheritance.

† "He that can first hap it, shall enjoy out the term." Finch, Law, p. 116. But the possession of land held *pur autre vie* is not more likely to be left vacant by the death of the tenant, than the possession of land held for any other estate; and the cases in which any one could "hap it" and acquire a title subsequently to the death of the tenant *pur autre vie*, must have been extremely rare. The object of sect. 12 of the Statute of Frauds was to make the lands assets for the payment of debts, not, as has often (but absurdly) been said, to prevent "scrambling for the lands."

trator, could be named as special occupant in the grant. (Harg. n. 4 on Co. Litt. 41 b; Com. Dig. tit. *Estates*, F. 1; Lord Redesdale in *Campbell* v. *Sandys*, 1 Sch. & Lef. 281, at p. 289. See, however, 1 Sugd. Pow. 7th ed. p. 233, note.) If the heir and the executor are both named in the grant, the heir has the special occupancy. (*Atkinson* v. *Baker*, 4 T. R. 229.)

Effect of naming the heirs of the body as special occupants.

The heirs of the body may be named as special occupants; and the naming of them affects the *quantum* of the estate, which is less than the *quantum* of a similar estate limited to the heirs general. Thus, if a tenant for his own life makes a lease to the immediate reversioner and the heirs of his body during the life of the tenant for life, this will be no surrender. (3 Prest. Conv. 22.) The possibility that there may be a failure of the heirs of the reversioner's body, by his death without issue during the lifetime of the tenant for life, gives to the latter a reversion upon his own grant, so that the last-mentioned grant is only the grant of an under-lease, which is therefore incapable of merger in the reversioner's estate.

Whether personal representatives may be special occupants.

After the Statute of Frauds, as hereinafter mentioned, the question, whether the executor or administrator might be named as special occupant, had no practical importance so far as freehold lands are concerned; because, if there was no special occupant, he would take the estate by force of the statute. And he would take it as an estate of freehold. (*Oldham* v. *Pickering*, 2 Salk. 464; this point is stated more fully in Carth. 376.)

Before the case of *Ripley* v. *Waterworth*, 7 Ves. 425, the opinion that personal representatives might be named as special occupants seems to have appeared only by way of casual surmise. (See 2 Vern. 719; 3 Atk. 466.) In the last-mentioned case Lord Eldon seems to have inclined towards the same opinion. But since the question did not call for decision, this opinion was *obiter dictum;* and the question had so long been deprived of nearly all its practical importance by the Statute of Frauds, that the principles upon which its solution depends seem to have fallen into complete oblivion. The question is now purely a question of historical criticism. Any reader who has any know-

ledge of the political and social condition of England before the Wars of the Roses, or, indeed, at any time before the reign of Henry VII., and also of the status of executors and administrators in our early legal system, will probably find it impossible to believe that, while the doctrines of tenure retained their importance, the intrusion of an executor into the immediate freehold would have been tolerated; especially as the lord had no means of compelling him either to take out probate or to disclaim the estate; so that, if he had delayed probate, the freehold might thereby have been kept in abeyance. The objection is even more obvious, in the case of an administrator, than in the case of an executor.

Occupancy of incorporeal hereditaments.

Of things which at common law lie in grant, and of which therefore no possession could be taken, there was no general occupancy. (Co. Litt. 41 b.) But of such things there might at common law (and still may) be special occupancy. (Litt. sect. 739, and Lord Coke's comment, where the word *occupant* evidently means *general occupant;* 16 Vin. Abr. 71 = *Occupant*, D.) An administrator could not be special occupant of a rent. (*Salter* v. *Butler*, or *Salter's Case*, Cro. Eliz. 901, Yelv. 9.)

Assignable at common law.

The tenant *pur autre vie* had, at common law, an absolute right of alienation *inter vivos*, whether his heir was entitled as special occupant or not; and, in the latter case, the estate of the assign was not affected by the death of the assignor. Estates *pur autre vie* were not made deviseable by the Statutes of Wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5.

Made deviseable by statute,

By the Statute of Frauds, 29 Car. 2, c. 3, s. 12, it is enacted that any estate *pur autre vie* shall be deviseable; and, if no devise be made, shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

It is commonly said, that this enactment made tenancy by general occupancy for the future impossible. (Harg. n. 5 on Co. Litt. 41 b.) But Preston has suggested that general occu-

pancy might still be possible, during the interval between the death intestate of a tenant *pur autre vie* and the grant of administration. (1 Prest. Conv. 44.)

and distributable as assets.

In *Oldham* v. *Pickering*, 2 Salk. 464, Carth. 376, it was decided that the estate in the executor's hands was assets only for the payment of debts, and that, these being satisfied, the executor, being "as it were the occupant," could not be compelled to make any distribution. In consequence of this decision, it was enacted by 14 Geo. 2, c. 20, s. 9, that (if there be no special occupant) estates *pur autre vie*, so far as not devised, should be applied and distributed in the same manner as the personal estate.

The Statute of Frauds, s. 12, and the 14 Geo. 2, c. 20, s. 9, are repealed by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 2; but they are substantially re-enacted and extended to copyholds and incorporeal hereditaments by sects. 3 and 6.

Quasi-entails of estates *pur autre vie.*

This kind of estate, though a tenement, is not intailable by virtue of the statute *De Donis*, not being a hereditament. (*Grey* v. *Mannock*, 2 Eden, 339.) But it is susceptible of limitations in the nature of a quasi-entail, which, if they are not destroyed by some act of the quasi-tenant in tail, will give rise to a quasi-descent resembling the descent of an estate tail; that is to say, an estate *pur autre vie* does not, as a mere chattel or chattel interest does, vest absolutely in a tenant in tail by purchase. (For a remarkable example, see *Mogg* v. *Mogg*, 1 Mer. 654, where see note at p. 688.) If the estate *pur autre vie* is conveyed subject to limitations which would create an entail in an inheritable tenement, any person entitled as quasi-tenant in tail in possession can, without barring the quasi-entail, convey the whole estate by any assurance which would pass an estate *pur autre vie*. (Fearne, Cont. Rem. 10th ed. 496, and cases there cited in margin.) It seems to have been thought by Lords Northington and Kenyon, that, since these estates have been made deviseable, quasi-entails of them might be barred by will. (See *Doe* v. *Luxton*, 6 T. R. 289, at p. 293.) But quasi-remainders limited over upon the quasi-estate tail cannot be barred by will. (*Dillon* v. *Dillon*, 1 Ball & B. 77; *Campbell* v. *Sandys*, 1 Sch. & Lef. 281; *Allen* v. *Allen*, 2 Dr. & War. 307.) And a quasi-

tenant in tail in remainder cannot, by conveyance *inter vivos*, bar the quasi-remainders over, without the concurrence of the person entitled in possession. (*Allen* v. *Allen*, *ubi supra*.) If the estate is suffered to descend, it will descend according to the form of the quasi-entail; and any quasi-remainders which may be limited over will take effect, if they become interests in possession during the life of *cestui que vie*, unless previously displaced by any such conveyance as aforesaid.

CHAPTER XXV.

OF CONCURRENT OWNERSHIP.

An estate, whether in possession or in remainder, admits of being so limited that several distinct individuals may be entitled to concurrent and simultaneous interests. Moreover, several persons may take the same estate concurrently by descent; either at common law, in the case of a descent to several sisters, or the representatives of several sisters; or by a descent in gavelkind among several brothers, or their representatives; or by other special custom, among several brothers and sisters, or their representatives. The several individuals so entitled will, according to the nature of the relation subsisting between their interests, be (1) joint tenants, (2) tenants in common, (3) parceners, also styled coparceners, or (4) tenants by entireties.

This arrangement is the most convenient for purposes of discussion, though it is not the most logical. According to the degree of the intimacy uniting the interests of the concurrent owners, the order of arrangement should be as follows: tenants by entireties, joint tenants, coparceners, and tenants in common. But joint tenancy and tenancy in common are of frequent occurrence in practice. Assurances are always made to trustees as joint tenants, in order that the survivor or survivors may retain the whole estate; and assurances, especially devises, are frequently made to beneficial owners as tenants in common. Coparceny is not common, because the descent of lands is not common; and in the majority of the cases which happen, the descent is not among coparceners. Tenancy by entireties, from the circumstances under which it arose, was always rare; and recent legislation may perhaps have made it for the future impossible.

Some remarks upon cross remainders are added to the remarks made upon tenancy in common, by reason of the intimate practical connection between the two subjects.

(1.) *Joint Tenancy.*

Definition and mode of limitation.

Littleton's definition of joint tenancy is founded upon the mode in which an estate is limited to joint tenants. If lands are limited to several persons by name, *habendum* to them for life, or lives, those persons are joint tenants during that life or those lives. (Litt. sect. 277.) They have an estate *pur autre vie* in joint tenancy. Similarly, if lands are limited to several persons by name, *habendum* to them and their heirs, those persons are joint tenants in fee simple.

By virtue of the provisions of the Conveyancing Act of 1881, s. 51, a joint tenancy in fee simple may be created by employing the words, "in fee simple," in lieu of the words, "and their heirs," in the last-mentioned limitation. (*Vide supra*, p. 171.)

Joint tenancy is equally applicable to fees (except fees in general tail, as mentioned in the next following paragraph), to estates of mere freehold, and to chattel interests. (Litt. sect. 281.)

Estates tail.

An estate in general tail cannot be limited in joint tenancy, because (except under the circumstances which would make the estate an estate in special tail) there cannot be a single heir of the bodies of the donees; and the right of the several heirs in tail of the several donees to inherit *secundum formam doni*, which is expressly conferred upon heirs in tail by the statute *De Donis*, would be repugnant to the right of the surviving joint tenants, upon the death of one, to enjoy the whole estate, which is the most prominent characteristic of joint tenancy. A limitation to several persons and the heirs of their bodies, other than a limitation to two persons capable of lawful marriage and the heirs of their bodies, gives them a joint life estate, followed by remainders to them severally, in general tail, as tenants in common. (Litt. sect. 283, and Lord Coke's comment.)

An estate in special tail, if limited to a man and a woman not married but capable of lawful marriage, and the heirs of their two bodies, will be an estate in joint tenancy. If the

parties had been married at the time when the limitation took effect, they would, at common law, be tenants by entireties. As hereinafter mentioned, it is uncertain what is the operation, in this respect, of the Married Women's Property Act, 1882.

Jus accrescendi.

The distinguishing characteristic of joint tenancy is styled *jus accrescendi*, or the *right by survivorship*. Upon the death of one out of several joint tenants, the survivors hold the whole estate, and nothing passes to the representatives in title (whether real or personal) of the deceased tenant. (Litt. sect. 280.)

Does not necessarily confer equal advantage upon all.

But the practical advantage of the *jus accrescendi* is not necessarily equal for each of the joint tenants; for two men may have a joint estate for the life of one of them; in which case, if that one who is *cestui-que-vie* should die in the lifetime of the other, the estate is determined, whereas, if the other should die in the lifetime of *cestui-que-vie*, the latter has the whole estate, and becomes thenceforward sole tenant for his own life. (Co. Litt. 181 b.) It still remains true, that each upon the death of the other takes the whole estate; but in the one case, the whole estate which he takes is reduced to nothing.

The right by survivorship is liable to be defeated by any act which severs the joint tenancy and turns it to a tenancy in common.

Identity of their interest and title.

Joint tenants must claim an equal interest by the same title and in the same right. (Co. Litt. 189 a; *ibid.* 299 b.) Therefore they can only take by purchase. And under limitations at the common law, they must all take simultaneously. But in limitations by way of use, if the use is declared jointly to several persons, some of whom are not yet ascertained or not yet in being, such last-mentioned persons, if and when they are ascertained or come into being, will be joint tenants with the others; and the same rule holds good, when the interests arise by devise. (Co. Litt. 188 a, and Harg. n. 13 thereon; 2 Prest. Abst. 56.) The identity of the interest and title of joint tenants is commonly analysed into the "fourfold unity" of *interest*, *title*, *time*, and *possession*. (2 Bl. Com. 180—184.) This analysis has perhaps attracted attention rather by reason of its captivating

appearance of symmetry and exactness, than by reason of its practical utility. It means only, that each joint tenant stands, in all respects, in exactly the same position as each of the others; and that anything which creates a distinction either severs the joint tenancy or prevents it from arising. Blackstone seems not to have adverted to the fact, that the "unity of time" is not, under the learning of uses and devises, an indispensable requisite.

For purposes of alienation, their interests are separate.

Joint tenants are said to be seised *per my et per tout;* which expression properly refers to *two* only, two being taken as a type or pattern for two or more. In one sense each has nothing, and in another sense each has the whole, *nihil per se separatim et totum conjunctim.* (Co. Litt. 186 a.) In another sense, each has an equal aliquot share; namely, for purposes of alienation, whether total or partial, and for purposes of forfeiture. (*Ibid.*) Each can alienate to an extent not exceeding his aliquot share, and can either, by a total alienation, *sever* the joint tenancy and turn it to a tenancy in common, or, by a partial alienation, *suspend* the joint tenancy during the continuance of the interest conveyed by such partial alienation. Herein joint tenants differ from tenants by entireties, who are seised *per tout* only, and not *per my;* and of whom, accordingly, neither can, by alienation or forfeiture, prejudice the right by survivorship of the other to succeed to the whole in severalty. (2 Bl. Com. 182.) At the present day, there does not seem to exist any means whereby a forfeiture properly so called, as distinguished from a reverter or a cesser of interest under a condition or executory limitation, can be incurred; and the foregoing remarks must be restricted to alienation.

Effect of severance on a lease for lives.

The following point is practically important. When two or more persons are joint tenants for their lives, whether by express limitation or by implication of law, and although the limitation be expressly *to the survivor of them*, then, on a severance of the joint tenancy, the share of each will afterwards be held for his own life only. (Co. Litt. 191 a; 2 Prest. Abst. 63.) This *is* because the words in italics are mere surplusage, which express nothing which the law would not without them have implied.

Hence it appears, observes Lord Coke, that a severance of the joint tenancy of a lease for lives is beneficial to the lessor.

In the limitation of a fee simple in joint tenancy, the words above placed in italics, instead of erring from mere superfluity, are highly pernicious. They turn the limitation to a joint freehold for lives, with a contingent remainder in fee simple to the survivor. (Butl. n. 1 on Co. Litt. 191 a.)

Partition.

At common law, one or more joint tenants could not be compelled by the other or others to make partition. (Litt. sect. 290.) Voluntary partition between them can be made only by deed. (Co. Litt. 169 a; *ibid.* 187 a.) By the statutes 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, the same right of partition as appertained at common law to coparceners, is given both to joint tenants and to tenants in common. By the Partition Act, 1868, 31 & 32 Vict. c. 40, and the Partition Act, 1876, 39 & 40 Vict. c. 17, the Court is empowered, subject to certain conditions, to substitute a sale for an actual partition.

(2.) *Tenancy in Common.*

Is a sole ownership.

A tenancy in common, though it is an ownership only of an undivided share, is, for all practical purposes, a sole and several tenancy or ownership; and each tenant in common stands, towards his own undivided share, in the same relation that, if he were sole owner of the whole, he would bear towards the whole. And accordingly, one tenant in common must convey his share to another, by some assurance which is proper to convey an undivided hereditament; and he cannot so convey by release. (2 Prest. Abst. 77.)

A title by tenancy in common may be claimed by prescription. (Litt. sect. 310.) This proves the severalty of the interest.

A man who, in his official capacity, is a corporation sole, as a bishop, may be tenant in common with himself, in respect of his two capacities, as an individual and a corporation. (Co. Litt. 190 a.)

How it may arise.

Tenancy in common may arise in any of the following ways:—

(1.) By express limitation.

At common law a gift or limitation contained in the premisses of a deed, which standing by itself would have created a joint tenancy, might be turned to a tenancy in common by express words in the *habendum;* such as, *habendum* the one moiety to the one and the other moiety to the other of them. (Co. Litt. 183 b.)

In modern assurances, which are commonly made under the Statute of Uses, tenancy in common is limited in the *habendum*, by declaring the use "as to one equal undivided moiety," or other fractional part, to one of the persons, with similar declarations in favour of the others respectively.

(2.) By the severance of a joint tenancy. (Litt. sect. 292.)

(3.) Similarly, by severance, through alienation, without partition, of the interests of coparceners. (Litt. sect. 309.)

(4.) By construction of law.

(i.) If a (contingent) remainder be limited to the heirs of two living persons, not being husband and wife, which remainder must therefore vest in interest at different times, the respective heirs will take as tenants in common. (*Windham's Case*, 5 Rep. 7, at p. 8 a, resolution 3; *Roe* v. *Quartley*, 1 T. R. 630.)

(ii.) Under a limitation, in the form of an estate tail, to two persons neither married nor capable of lawful marriage, or to three or more persons, they will take in common. (*Windham's Case*, *ubi supra*, resolution 4.)

Other instances might be specified; but in the present state of the law, they are not material in practice.

The shares may be unequal.

There is nothing in the nature or origin of tenancy in common to import any necessity that the shares taken by the different tenants must be equal; because they hold by several,

or different, titles, not by a joint title. (*Litt.* sect. 292.) Their shares will, accordingly, be unequal, whenever the circumstances under which their titles arose were such as to institute any diversity between them. On an express limitation, unequal shares may be expressly limited; and then the shares will be unequal from the commencement of the severance of the shares. When the origin of the tenancy in common is by the severance of a joint tenancy, or by a change in the title of coparceners, the shares will in their inception be equal; but inequality may be subsequently introduced, by more than one of such equal shares becoming united in the same hands.

Cross remainders: how connected with tenancy in common.

The subject of cross remainders is intimately connected with tenancy in common; because the cross remainders are necessarily, and the particular estates upon which they are limited may be, and frequently are, limited by way of tenancy in common.

The following remarks will be confined to particular estates tail, followed by cross remainders in tail; which is the only form in which cross remainders are material to be considered in practice.

In separate parcels, or in undivided shares.

The particular estates upon which the cross remainders depend may either be estates tail in separate parcels of land, or may be estates tail in several undivided shares of the same parcel of land. In other words, a man having several distinct farms, or other parcels, may limit them separately in tail to separate persons, with cross remainders between them; or having one parcel only, may limit that parcel in tail to several persons as tenants in common, with cross remainders between them of their several undivided shares.

When cross remainders are limited in respect of undivided shares of the same parcel, these shares are in practice always equal, and the limitation of the remainders is also in equal shares. The following remarks will be confined to equal cross remainders between equal undivided shares of the same parcel.

To two persons.

Cross remainders between two persons only present no difficulty to the imagination. Lands are limited as to one

undivided moiety to A. in tail, with remainder to B. in tail; and as to the other undivided moiety to B. in tail, with remainder to A. in tail.

To more than two persons.

The general result of a similar limitation, when made to more than two persons, expressed in somewhat colloquial language, is, that upon the failure of each stock, its share is divided equally among the other stocks; and so often as another failure of a stock occurs, the share held by that stock, *whether original or accrued*, is divided equally among the still subsisting stocks; so that, when the stocks have been reduced to two, each will have obtained a moiety; and finally, the last subsisting stock will get the whole.

This process of accruer is, of course, liable at any stage to be interrupted in respect to each stock, by such stock barring the entail in its share.

Preston's definition.

The more formal definition given by Preston is as follows:— "Cross remainders, as between three or more persons, are several remainders limited to each of three or more persons, in lands, or in the parts of lands, previously limited to each of them, and operating by way of successive accumulated remainders on the several aliquot parts, which each takes in the shares of the others; so that, in the first place, or by way of immediate estate, each person is to have a parcel of land, or a part of a parcel of land, and the others, as tenants in common, are to have an estate in remainder in the lands or part of this person; and the persons taking each part under each successive gift of remainders, are to have remainders, in like manner, in the part limited to each other, till every subdivided part is divisible between two persons only; and then each of these persons is to have a remainder in the share of the other; so that, ultimately, by small undivided parts, the entirety of the lands may centre in one person." (1 Prest. Est. 96.)

Each person under the original limitation will have a *vested* estate in the whole of the lands, made up of separate estates in separate fractions. The first estate will be an estate in possession in his own aliquot undivided share; and the others will be remainders, of successively increasing degrees of remoteness, in fractions of the other aliquot shares.

Cross remainders by implication.

It is settled law, that in a deed cross remainders cannot arise by implication, but only by express words. (*Cole* v. *Levingston*, 1 Vent. 224; *Doe* v. *Dorvell*, 5 T. R. 518.) In a will cross remainders may arise by implication; but a stronger ground of presumption, or evidence of the testator's intention, is required when the limitation is to three or more persons, than when it is to two only. (See notes to *Cook* v. *Gerrard*, 1 Wms. Saund. 170, at p. 185; *Powell* v. *Howells*, L. R. 3 Q. B. 654; *Re Ridge's Trusts*, L. R. 7 Ch. 665; *Hannaford* v. *Hannaford*, L. R. 7 Q. B. 116; *Hudson* v. *Hudson*, 20 Ch. D. 406.) On the question, whether cross remainders should be inserted among the limitations of an executory settlement, see *Surtees* v. *Surtees*, L. R. 12 Eq. 400.

(3.) *Parceny or Coparceny.*

Definition and general characteristics.

Parceners, or coparceners, are where several persons together constitute a single heir; as the daughters, where there is no heir male, in respect to common law lands, and the sons, in respect to gavelkind lands. (Litt. sects. 241, 265. As to gavelkind, see more at large Rob. Gav. 138 *et seq.*) The same rule holds of sisters, aunts, and other groups of female kinsmen in the same degree, there being no prior heir male. (Litt. sect. 242.) But with respect to gavelkind lands, it is to be observed that, though by the custom of Kent the rule of coparceny extends to collateral descents (Rob. Gav. 115), this is not necessarily true of gavelkind lands situated elsewhere; and a custom to that effect must be proved as a special custom. (Co. Litt. 140 a, b.) The rule of representation holds good in descents in parceny; so that the issue of a person who, if living at the time of the descent, would have been a parcener, will take in parceny along with the other like persons. But such issue, as respects the amount of their share, take *per stirpes* and not *per capita*. (Co. Litt. 164 b.)

Parceners hold a position intermediate between joint tenants and tenants in common. Like joint tenants, they have among them only one single freehold, so long as no partition is made. Like tenants in common, they have among themselves no *jus accrescendi;* but upon the death of one parcener, a descent takes place of her aliquot share. And one parcener may at common

law convey to another by an assurance proper to convey a several estate, as a feoffment. (Co. Litt. 164 a.) But such conveyance might also be made by release. (Co. Litt. 9 b.)

A female who, having no sisters, stands in the position of heir, is of course styled the heir and not a parcener. (Litt. sect. 242.)

To sum up the foregoing points, it will be observed that for some purposes parceners constitute a single person and have but one single estate between them, while for other purposes they are regarded as being several persons and as having several estates.

1. They make together but one heir to their ancestor. Yet they were separate persons for the purpose of escheat by attainder. If a man had died, leaving no sons but two daughters living, one of whom had been attainted of felony, one moiety would have escheated. (Co. Litt. 163 b.)
2. They can convey *inter se* either by assurances proper to convey several estates, or by release.
3. They pass (at common law) their whole aliquot share to their descendants, *per stirpes*, whether the descent occurs before or after the death of their common ancestor. This rule is not altered by the Descent Act.

Partition.

One parcener was, even at common law, entitled as against the others to a compulsory partition. (Litt. sect. 241.) The intrinsic union between the shares of parceners is shown by the fact that, on a partition, nothing was held to pass from one parcener to another, and therefore a partition between them was no purchase to make an alteration in the course of descent. (2 Prest. Abst. 471; *ibid.* 431.) This rule extends even to partitions made between some of the parceners and the assignees of the others, so far as the shares taken by the parceners are concerned. (*Doe* v. *Dixon*, 5 Ad. & E. 834.) A rentcharge granted for equality of partition is descendible in the same manner as the land. (Co. Litt. 169 b.)

Voluntary partition might be made between parceners by mere parol agreement, or by drawing lots, or by reference to the award of arbitrators agreed upon beforehand by all the

parties. (Litt. sects. 243, 244, 246.) Lands which had been given in frank-marriage to one daughter must be brought by her and her husband into hotchpot. (Litt. sects. 266, 267.)

By 8 & 9 Vict. c. 106, s. 3, a partition made after 1st October, 1845, is void at law unless made by deed.

After judgment upon a writ of partition at common law, a writ was directed to the sheriff, ordering him to make the partition by the oath of twelve lawful men of the county. (Litt. sect. 248.) But the men of this inquest must be chosen from the neighbourhood of the lands. (Co. Litt. 168 b.)

The Court of Chancery from very early times exercised jurisdiction in respect to partition, when land holden of the King *in capite* descended upon parceners, one or more of them being under age. (Fitzh. N. B. 256 F; *ibid.* 260 B.) This jurisdiction, being incident to the tenure, and a consequence only of the necessity for livery of the lands out of the King's hand, was practically abolished by 12 Car. 2, c. 24. Suits for partition were also frequently instituted and entertained under the court's equitable jurisdiction, when this had grown into general recognition; and under this jurisdiction a decree for partition was regarded as a matter of right, upon proof of title. (2 Com. Dig. 762.)

Descent.

At common law, upon the death of one parcener, her whole share descended to her issue. (Co. Litt. 164 a.) This rule is not altered by the Descent Act. (*Cooper* v. *France*, 19 L. J. Ch. 313; *Paterson* v. *Mills*, 19 L. J. Ch. 310.)

(4.) *Tenancy by Entireties.*

Definition and mode of limitation.

Tenancy by entireties occurs, at common law, when a gift or conveyance, which, if made to two strangers, would create a joint tenancy, is made to a husband and wife during the coverture. (Litt. sect. 291, and Lord Coke's comment;* 2 Prest.

* Lord Coke does not use the phrase "by entireties." He speaks of cases in which "the husband and wife *shall have no moieties*." That is to say, he regards tenancy by entireties as being a species of joint tenancy, with the distinguishing characteristic that it confers no power of *severance*. This accords with the definition above given.

Abst. 39. See Co. Litt. 326 a:—"Where the husband and wife are jointly seised to them and their heires of an estate *made during the coverture.*")

The peculiarities of this kind of tenancy arise out of the identity which the common law imagines to exist between husband and wife. (Litt. sect. 291.) It is equally applicable to estates in fee simple, in fee tail, for the lives of the parties, and *pur autre vie.* (2 Prest. Abst. 39.)

Distinguished from joint tenancy.

It constitutes the most intimate union of ownership known to the law. A husband, being tenant by entireties of freeholds with his wife, cannot by any alienation bar her right by survivorship in any part. (Co. Litt. 326 a; *Doe* v. *Parratt*, 5 T. R. 652, at p. 654.) They are accordingly said to hold *per tout et non per my.* (2 Bl. Com. 182.) The same rule formerly applied also to forfeiture. (Co. Litt. 187 a.)

As to chattels real.

Preston affirms that this kind of tenancy is applicable to a term of years. (2 Prest. Abst. 39.) But he also states that, unless the term is a provision for the wife under some antenuptial agreement, the husband alone can assign the term. (*Ibid.* 43, 57.) If this doctrine is correct, it is difficult to see in what a tenancy by entireties of a term of years differs from a joint tenancy. The case of *Grute* v. *Locroft*, Cro. Eliz. 287, cited by him as an authority in support of this doctrine, is by no means conclusive, for it is distinctly stated that there the tenancy was a joint tenancy.

Equities of redemption and personal chattels.

The case of *Martin* v. *Mowlin*, 2 Burr. 969, seems to show, that in a tenancy by entireties of an equity of redemption, the husband in his wife's lifetime can convey the whole. As regards money and personal chattels, the husband alone can give a good discharge therefor, and can alienate after reduction into possession; and the wife has no equity to a settlement thereout. (*Ward* v. *Ward*, 14 Ch. D. 506; *Godfrey* v. *Bryan*, *ibid.* 516.) But it would seem that, if the court gets hold of the property, it will practically prevent the husband from exercising his right of alienation, by retaining the fund in court; thus preserving to the wife her chance of taking the corpus by survivorship. (*Atcheson* v. *Atcheson*, 11 Beav. 485.)

Husband and wife might be tenants by entireties, as between themselves, of an undivided share; and might, as regards the owners of the other undivided shares, be either tenants in common or joint tenants.

The Married Women's Property Act, 1882.

It is difficult to say what is the effect, upon tenancy by entireties, of the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75. This is one of the questions, which seem to have escaped the attention of the legislature when that statute was enacted. In *Mander* v. *Harris*, 24 Ch. D. 222, Mr. Justice Chitty seems to have thought that the effect of the Act is to destroy the status of coverture, so far as this status affects mutual rights, or incapacities, in respect to the ownership of property. His judgment was afterwards reversed upon appeal; but upon special grounds which do not affect the above-stated opinion. (32 W. R. 941.)

Preston was of opinion that, by express words, a husband and wife might, at common law, be made tenants in common under a gift to them during the coverture. (2 Prest. Abst. 41.) This would seem to imply that, in his opinion, the creation of this tenancy was a question of intention; though, in the absence of an expressed intention to the contrary, the law presumed the intention to be in favour of the tenancy by entireties. If this view is correct, it would seem that the effect, in this respect, of the Married Women's Property Act, 1882, is simply to reverse the rule, or implication, of law. Where, at common law, an express intention was required to prevent tenancy by entireties from arising, an express intention will now be required in order that it may arise. Though the Act enables certain things to be done, which could not be done at common law, it does not seem to disable the parties from doing anything which was formerly lawful. If, on the other hand, the origin of the tenancy at common law was not due to intention, but was due solely to the incidents of what may be called the proprietary status of coverture, and if Mr. Justice Chitty was right in thinking that this status has no longer any existence, then it would follow that this tenancy can no longer be created. The former seems to be the more plausible view.

PART IV. ON ASSURANCES.

CHAPTER XXVI.

ASSURANCES IN GENERAL.

General remarks on the influence of statutes upon assurances.

ASSURANCES (other than wills and testaments) are commonly divided into assurances operating by the common law, and assurances operating by the Statute of Uses. But it must be remembered that many of the latter assurances derive part of their operation from the common law. It must also be remembered that the Statute of Uses, though its influence upon assurances in general is greater than that of any other statute, is not the only statute upon which certain kinds of assurances depend for their operation or validity. The following examples are worthy of notice.

(1.) Modern disentailing assurances and assurances by married women and their husbands derive their operation partly from the Fines and Recoveries Act. And because *that* statute, for the purpose of barring an entail, only superadds inrolment to the assurances otherwise appropriate to the conveyance of a fee simple, it follows that disentailing assurances may also derive part of their operation from the common law and from the Statute of Uses.

(2.) It has been remarked by Butler, and is indeed obvious, that in the old-fashioned assurance styled "by lease and release," the lease alone derived its operation from the Statute of Uses: the bargainee for a year under the lease, so soon as his possession was executed by the statute, being capable at common law of taking a release of the reversion. The conveyance could be made without the help of the Statute of Uses, by making a lease to take effect as a common law lease, instead of as a bargain and

sale for a year, and causing the lessee to take actual possession under it, instead of relying upon a constructive possession executed by the statute: a method which was sometimes employed in conveyances by corporations, who, not being capable of being seised to a use, could not, by means of a bargain and sale, raise a use capable of being executed by the statute. For the same reason, corporations not unfrequently conveyed freeholds in possession by feoffment, appointing an attorney under their common seal to give livery of the seisin. The 4 & 5 Vict. c. 21, s. 1, enabled an assurance to be made by a single deed, having the same operation as the two deeds formerly used in assurances by lease and release. It superseded the need for the preliminary lease, by giving to the release alone, if expressed to be made in pursuance of the Act, a purely statutory operation as a conveyance of estates of freehold in possession. This Act was in force from 15th May, 1841, till 7th August, 1874, having been repealed by the Statute Law Revision Act, 1874 (No. 2). But it was seldom used in practice, after the coming into operation of 8 & 9 Vict. c. 106, on 1st October, 1845. The writer has met with an example of its use in a deed dated August, 1852.

(3.) During the time that 7 & 8 Vict. c. 76, remained in force—from 31st December, 1844, to 1st October, 1845—another statutory method existed of conveying estates of freehold in possession. This was not confined to a release, and was not expressed to be made in pursuance of the Act.

(4.) The last-mentioned Act was repealed by 8 & 9 Vict. c. 106, which, without repealing 4 & 5 Vict. c. 21, practically superseded it by providing a more convenient form of assurance. Sect. 2 enacts that after 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. All modern assurances of estates of freehold in possession, except a feoffment and a bargain and sale inrolled, depend for their validity upon this statute.

Conveyances of estates of freehold in possession, taking effect by virtue of any of the above-mentioned statutes, 4 & 5 Vict. c. 21, 7 & 8 Vict. c. 76, or 8 & 9 Vict. c. 106, owe all their efficacy to the particular statute and at common law would be wholly inoperative; unless by reason of peculiar circumstances they can be construed to take effect by some means foreign to their purport. (See the notes to *Chester* v. *Willan*, 2 Wms. Saund. 283.)

Sect. 49 of the Conveyancing Act of 1881 declares, that the use of the word *grant* is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal. Since no substitute is mentioned, it is not clear what would have been the effect of this enactment, if the word grant had been otherwise necessary to pass things lying in grant. Until the coming into operation of 8 & 9 Vict. c. 106, the word grant was neither necessary nor appropriate to pass corporeal hereditaments. Since that date, corporeal hereditaments (which phrase includes corporeal tenements) have been numbered among things lying in grant; and the word grant has been appropriate to pass them, but not necessary. (*Shove* v. *Pincke*, 5 T. R. 124; *Haggerston* v. *Hanbury*, 5 B. & C. 101.) It is probable that the word *convey*, which occurs frequently in the Conveyancing Act of 1881, will in future be often used; though it would be difficult to give any reason for preferring this substitute.

Before the coming into operation of 8 & 9 Vict. c. 106, remainders and reversions were capable, at common law, of being conveyed by grant; but that mode of assurance was not commonly used in practice, because it was essential to the validity of the assurance that the existence of the particular estate should be proved. For this reason it was the common practice to convey remainders and reversions either by lease and release or by bargain and sale inrolled. (2 Prest. Abst. 85.)

(5.) Sect. 65 of the Conveyancing Act of 1881, amended by sect. 11 of the Conveyancing Act of 1882, enacts that, under certain circumstances and subject to certain restrictions, the unexpired residue of a long term of years may be enlarged into a fee simple, by some one or other of sundry persons entitled in right of the term. Such enlargement is in no way dependent upon the concurrence of any person entitled in reversion.

(6.) Sect. 15 of Lord Cranworth's Act, 23 & 24 Vict. c. 145, enables the person exercising the power of sale conferred by the Act upon mortgagees, to vest in the purchaser all the estate and interest which the mortgagor had power to dispose of; but, in the case of copyholds, only the beneficial interest. This enactment was repealed by the Conveyancing Act of 1881. It created a statutory power, by which mortgagees were sometimes enabled to convey a greater estate than was vested in them.

The above-mentioned enactments, and also all enactments creating statutory powers, which give to the deeds to which they relate an effect or *modus operandi* which could not have been given to them by the mere act of the parties, do not stand upon the same footing as 8 & 9 Vict. cc. 119, 124; Lord Cranworth's Act, with the exception of sect. 15 above mentioned; or sects. 6, 7, 18, 19, 34, and 63 of the Conveyancing Act of 1881, and similar enactments: which merely aim at dispensing, either wholly or partially, with the actual expression by the parties of something which they were competent to effect without any legislative assistance.

General remarks on the nature of uses.

Excepting only the capacity of being executed into legal estates, uses were in all respects the same before the statute as afterwards. Our early jurists regarded the legal estate in fee simple, and the conterminous use, as being two separable things, commonly found together, and *primâ facie* presumed to be united in the legal tenant; but capable of separation, and having definite characteristics when separated. When such separation took place, the use conferred the right, both to take the profits of the lands, and also to call upon the person having the legal estate to make such conveyances thereof as the person having the use should think fit. The following propositions were clearly established from early times:—

(1.) Regarded as a *descendible entity*, the descent of the use followed the descent of the thing of which it was the use. So that, (i) the use of lands which were subject to no peculiar local custom, held for an interest analogous

to a common law fee simple, descended to the heir general; (ii) the use of gavelkind lands descended according to the custom of gavelkind; and (iii) of borough-english lands, according to the custom of borough-english; (iv) other peculiar local customs affecting common law lands, when good in law, had the like effect upon the descent of the use of them; and (v) the use of copyholds descended according to the custom of the manor.

And it was as impossible to change the course of descent of the use as to change that of the legal estate. (1 Prest. Est. 448; Rob. Gav. 98, 99.) So far as the law permitted new estates to be created and taken by way of *purchase*, the use (like the legal estate) could of course be made to go to any person whatsoever; but by purchase only, not by descent, unless such person was the next in the order of descent prescribed by the law.

(2.) The person entitled to the use (*cestui que use*) *might* alienate the use, by conveyance *inter vivos*.

(3.) So also he might devise the use, before the Statutes of Wills, although the use was of lands which were not themselves deviseable.

(4.) By the statute 1 Ric. 3, c. 1 (which was not positively repealed until 1863, when it had for ages been quite obsolete), *cestui que use* was enabled to make conveyances *inter vivos* of the lands themselves, which were good, not only as against *cestui que use* to convey the use, but also as against his feoffee to uses, so as to convey the legal estate. This statute never had any extensive operation. For an instance of its use in practice, see Dy. 283 a, pl. 30.

In all essential characteristics these uses resemble what we now call *equitable estates*, differing from them mainly by reason of the greater complexity of limitation to which the ingenuity of conveyancers has gradually subjected the latter. This greater complexity has proceeded *pari passu* with the increasing com-

plexity in the limitation of legal estates; and both these developments are due, in a great measure, to the influence of the statute 27 Hen. 8, c. 10, commonly called the statute for transferring uses into possession, or, more briefly, the Statute of Uses.

General effect of the Statute of Uses.

It seems strange that the legislature, when it enacted that uses should be transformed into legal estates, should not have foreseen that, unless at the same time people were forbidden to raise or declare uses, they would soon take to raising and declaring uses as a method of creating and conveying legal estates.

The result has been that the easy plasticity which the Court of Chancery from early times permitted to the declaration of uses has been, in a great measure, imported into the methods of creating legal estates. Instead of the land stifling the activity of uses, the latter have imparted their mercurial properties to the land.*

Origin of modern trusts.

Moreover, since it was decided soon after the passing of the statute, that no use could be limited *upon a use* (Bacon, Uses, 43; 2 Bl. Com. 335), it was only necessary to interpose a second seisee to uses between the feoffee or grantee and the *cestui que use*, in order to restore the old system of equitable estates or trusts: a device which gave occasion to Lord Hardwicke's celebrated remark, that "a statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect than to add at most three words to a conveyance." (1 Atk. 591.) But this lively rhetoric must not be taken quite seriously; nor is it quite clear whether he wished that equity had refused to enforce the trust, or that the law had consented to execute the seisin.

The above-mentioned decision, which only imports, when it is rightly understood, that a use is not a *hereditament* within the meaning of the statute, has been subjected to much petulant, if not ignorant, censure. In the opinion of the present writer, it has been well defended by Rowe, in his edition of Bacon on Uses, note 74, p. 134.

* "And because uses were so subtle and ungovernable, as hath been said, they have with an indissoluble knot coupled and married them to the land, which of all the elements is the most ponderous and immoveable." 1 Rep. 124 a.

Whether the Statute of Uses applies to wills.

The question, whether the Statute of Uses applies to wills has given rise to much difference of opinion. The objection (Butl. n. 1 on Co. Litt. 272 a, VIII. 1) that the Statute of Uses was passed before the first Statute of Wills, 32 Hen. 8, c. 1, seems to be intrinsically futile; and at the present day it might lead to the awkward inference that grants of freeholds in possession, made by virtue of 8 & 9 Vict. c. 106, s. 2, are also not within the statute. But since it is the unquestioned fact that the intention of the testator itself avails to convey the legal estate, and that this intention may be made effectual by any language which is clearly intelligible, it follows that the machinery of the Statute of Uses cannot be *necessary* to carry into effect the intention of a testator; that he might dispense with it if he thought fit to declare such an intention; and that, in so far as the machinery of the statute has practically been applied to the interpretation of wills, this has been done only because their language gave rise to the inference that the testator intended to follow the analogy of the statute. This analogy has been applied when the limitations in the will, by following in detail those which would be appropriate in a deed, suggest a corresponding intention. In particular, it is clearly settled that the doctrine of *a use limited upon a use* applies to wills, and that, where such a double use occurs, the legal estate is fixed in the person who takes the first use, though he be only a trustee without any active duties to perform. (2 Jarm. Wills, 4th ed. 290.) But in general, and apart from the indication of intention supplied by the existence of a use upon a use (that is, a use followed by a trust), the estate taken by trustees is generally restricted in wills to what is required for the fulfilment of their trust. This doctrine of cutting down the estate taken by trustees has no application to settlements effected by deed. (*Cooper* v. *Kynoch*, L. R. 7 Ch. 398.)

The first and most important section of the Statute of Uses, abbreviated by the omission of what is not necessary to the consecutive construction, is as follows:—

The form of sect. 1 of the statute.

"That where any person or persons at any time hereafter shall be seised, of and in any hereditaments, to the use confidence or trust of any other person or persons or of any body politic, by any . . means whatsoever, . . . in every such case all and every such person and persons and bodies

politic that . . . shall have any such use confidence or trust shall . . . be . . . deemed and adjudged in lawful seisin estate and possession of and in the same hereditaments, ... to all intents constructions and purposes in the law, of and in such like estates as they had or shall have in use trust or confidence of or in the same."

Principal points.

The statute is expressly made applicable both to uses then in existence and to those subsequently created. The following propositions respecting the uses which are contemplated by it, follow naturally from its language, and have always been taken as indisputable; unless the case of *Holland* v. *Boins* or *Bonis*, 2 Leon. 121, at p. 122, 3 Leon. 175, at p. 176, be thought to cast any doubt upon the 2nd:—

1. A person must be seised to the use.
2. Here *person* does not include *body politic;* as is shown by the repeated omission of body politic when speaking of the person seised and the repeated mention of body politic when speaking of *cestui que use.* A corporation cannot be seised to a use. (Bacon, Uses, 42, 57; and Rowe, note 113, p. 178, see p. 184; 1 Rep. 122a, 127a; *Fulmerston* v. *Steward*, Plowd. 102, at p. 103; and see at p. 538; Shep. T. 508; 2 Prest. Conv. 255, 256; 2 Sand. Uses, 27, note.) But a natural person may be seised to the use of a corporation. And a natural person, who is also a corporation sole, as a bishop, may be seised in his natural capacity to the use of himself and his successors in their corporate capacity. (Bacon, Uses, 64.)
3. Since he is seised, his estate must be of freehold.
4. But the *quantum* of the interest contained in the use is not necessarily equal to a freehold.
5. The person seised cannot in general be identical with the person entitled to the use. The common forms, habendum *unto and to the use of* the grantee do not take effect by the Statute of Uses, but by the common law.

 But such a declaration of a use to the grantee himself, though it is not a use which is capable of being executed by the statute, and though it has no effect upon the seisin which would be in the grantee by the common law without it, nevertheless avails to make any subsequent use limited upon it, incapable of being executed by the

statute. Such a subsequent use would be a "use limited upon a use," and would take effect, if otherwise valid, as a trust.

And in certain cases, in which it is held that there is "a direct impossibility or impertinency for the use to take effect by the common law," the seisee to uses may himself take by the statute. (Bacon, Uses, 63.) Bacon goes on to enumerate the following examples, which are thus summed up by Sanders (1 Sand. Uses, 92) :—

(1.) Where the use is limited to the feoffee (or other seisee to uses) in tail out of his own seisin in fee simple, and the remainder over to another;

(2.) Where the whole seisin in fee simple is conveyed to the feoffee, and many estates in the use are carved out of such seisin, one of which estates the feoffee takes;

(3.) If the feoffee be seised to the use of himself and another jointly;

(4.) If a feoffment be made to a bishop and his heirs to the use of himself and his successors. This, if a case in point, is not precisely on a level with the other instances, because the use is here *en autre droit*.

The uses above specified are executed by the statute. But if A. be infeoffed to the use of B. for life, and afterwards to the use of himself and his heirs, the latter use is not executed by the statute; but A. is in by the common law retaining the residue of his original estate; and therefore he takes by way of reversion and not of remainder. (Bacon, Uses, 64.)

Preston, in summing up his statement of the case of *Goodhill* v. *Brigham*, 1 Bos. & P. 192, treats it as having decided that "a person cannot be seised to his own use, when there is not any other purpose to be served." (3 Prest. Conv. 269.) This proposition seems well to express the general rule, subject to the above-stated exceptions.

Assurances operating under the statute.

It results from the foregoing considerations, that the main question, upon which depends the theory of the raising of estates by way of use, is as follows :—*Under what circumstances, and by what methods, can a use be so connected with a seisin, that the person having the seisin can be said to be seised to the use within*

the meaning of the Statute of Uses; so that the use will be executed into a legal estate by the statute?

The outline of the reply to this question is contained in the following propositions:—

(1°) Any person capable of transferring by conveyance a seisin vested in himself to another, may, upon the making of such conveyance, declare any use or uses upon the seisin in the transferee, to or in favour of any person or persons other than the transferee: which uses, if valid as uses, will be executed by the statute.

The proviso, *if valid as uses*, imports that the declaration of uses is subject to restriction. Any use which contravenes the rule against perpetuities is void. Moreover, no estate can be raised by way of use except such as, in point of *quantum*, might be conveyed at the common law; and no course of devolution except that prescribed by the law can be prescribed by way of use.

(2°) Under certain circumstances, a person having the seisin in himself may raise or declare uses upon that seisin while remaining in himself, which uses are capable of being executed by the statute.

These propositions explain the meaning of the common *dictum*, that conveyances which take effect under the statute operate sometimes with transmutation of the possession, and sometimes without transmutation of the possession.

Assurances with transmutation of possession.

The following is a list of the principal assurances by which a seisin may be, or might formerly have been, conveyed to another person within the meaning of the first of the foregoing propositions:—

1. A fine; and
2. A recovery; until these assurances were abolished by the Fines and Recoveries Act.
3. A feoffment.
4. A release of the reversion on an estate, less than a freehold, to the person having the less estate.

The above-mentioned assurances convey the seisin by the common law. From the fourth, by engrafting upon it a bargain and sale for a year, taking its effect by the

statute, was derived the old assurance by lease and release.

5. Since the 8 & 9 Vict. c. 106, a grant of the seisin: which is the method now almost universally used.

The seisin being conveyed by any of the aforesaid methods, the uses declared thereupon, if otherwise valid, are within the statute.

Assurances without transmutation of possession.

The assurances which may take effect by the statute without transmutation of the possession,—that is to say, by which, under peculiar circumstances, a person may raise or declare a use, capable of being executed by the statute, upon a seisin vested in himself,—are as follows:—

1. A bargain and sale.
2. A covenant to stand seised to uses, in consideration of blood or marriage: commonly styled, for brevity, a covenant to stand seised.

CHAPTER XXVII.

OF FINES AND RECOVERIES.

SINCE fines and recoveries now not only are obsolete, but do not exist, it is unnecessary to add much to the remarks above made upon the operation of these assurances when levied, or suffered, by tenant in tail. (See Chapter XXI., *supra*.)

These assurances were reckoned among the "common assurances of the realm;" and the use of them was by no means confined to their operation to bar estates tail. By reason of the statutory title gained against strangers to the fine under the 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, by a non-claim of five years' duration, fines were extensively used to strengthen doubtful titles; and even, by a species of fraud, to manufacture fictitious titles which, by a non-claim of five years' duration, became indefeasible as against all persons who might have made their claim at the time when the fine was levied. From this point of view it may be said that a fine operated to abridge to five years the period allowed by the Statutes of Limitation for the prosecution of an adverse claim. A fine had also the further advantage, that it gave an actual title; whereas the Statutes of Limitation previous to the 3 & 4 Will. 4, c. 27, gave no title, but only barred the remedy of the claimant.

The effect of non-claim on a fine.

The operation of a fine, levied with proclamations by force of the statutes 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, was regulated by these cardinal principles:—

Three rules governing fines.

(1°) Since strangers might, at common law, avoid a fine upon a plea *partes finis nihil habuerunt*, which right was saved by the last-mentioned statutes, it was necessary to the validity of the fine that one of the parties should be entitled to an estate of freehold in the lands. But any estate, whether in possession, remainder or reversion, would support a fine; and, generally, even though it had been gained by disseisin or tort.

(2°) A fine would not bar any estate which was not so far devested as to be turned to a right of entry. If it were so far devested as to be *discontinued*, that is, turned to a right of action, such discontinuance would, *à fortiori*, suffice. The devestment or discontinuance might be effected either previously to the fine or by force of the fine itself. (See Butl. n. 1 on Co. Litt. 332 b; 2 Prest. Abst. 306; 3 *ibid.* 135.)

(3°) When several distinct rights, under several distinct titles, accrued to the same person at different times, he had several and distinct periods of five years allowed to him, commencing respectively from the respective times of accruer, within which to prosecute them respectively. (Cruise, 1 Fines & Rec. 237.)

How fines barred dormant titles.

It follows from these principles, that any person having any such possession of land as would qualify him to make a feoffment, though a tortious feoffment,* could simultaneously convey a sufficient estate to support a fine against the plea *partes finis nihil habuerunt*, and also sufficiently devest the estates rightfully subsisting under the former seisin, which was displaced by the feoffment. A fine so levied would therefore bar all those estates (so far as regards persons not under disability) upon the expiration of five years after the completion of the fine. The bar would not be complete, as against persons under disability, until the expiration of five years from the cessation of the disability. If the feoffment were made by a tenant for life or years, the remainderman or reversioner would, after the death of such tenant or the expiration of the term, as the case might require, have a fresh period of five years to prosecute his claim. For though the tenant for life or years had incurred a forfeiture of his estate, the remainderman was not bound to take advantage of the forfeiture.† Upon the determination of the particular estate, whether for life or years, a new right accrued to the remainderman; and, by consequence, a new period of five years within which it might be prosecuted. (See *Fermor's case*, 3

* Upon the tortious operation of a feoffment, see p. 328, *infra*.
† *Per* Lord Hardwicke, in *Kemp* v. *Westbrook*. 1 Ves. sen. 278.

Rep. 77; *Whaley* v. *Tankard*, 2 Lev. 52, 1 Vent. 241; *Brandlyn* v. *Ord*, 1 Atk. 571; Cruise, 1 Fines & Rec. 239.)

Uses declared on a fine or recovery.

Uses might be declared upon the seisin which passed by means of a fine or a recovery, in the same way as they might be declared upon the seisin which passed by a feoffment; and such uses, since they caused the conusee, or the recoveror, to be "seised to the use" of the person entitled to the benefit of the use, were within the language and intent of the Statute of Uses and were executed by the statute. The uses of a fine were declared by the person by whom it was levied; and the uses of a recovery were declared by the person by whom it was suffered. If no uses were declared, and the fine was levied, or the recovery suffered, without valuable consideration, the use, and with it, by virtue of the statute, the legal estate, resulted to the person entitled to declare the use.

Owing to the last-mentioned circumstance, a doubt at one time existed, whether a tenant to the *præcipe* could be made by levying a fine without any declaration of use; for it was thought that the seisin might be forthwith devested out of the tenant to the *præcipe* by the resulting of the use, instead of remaining in him to enable him to serve the purposes of the recovery. But it was decided that the use would not result contrary to the intention of the parties. (*Altham* v. *Anglesea*, 11 Mod. 210; 2 Salk. 676.)

Fines and recoveries as assurances by married women.

Since a married woman might always, at common law, be joined as a co-defendant with her husband in an action at law, it follows that she could concur with him in levying a fine or suffering a common recovery; because, for all technical purposes, these stood in exactly the same position as the actions at law which they simulated. Before the Fines and Recoveries Act, a fine was the assurance commonly used by married women to release dower or convey estates of inheritance. A recovery had the like effect; but it was not commonly used in practice for these purposes, unless it was also intended to be used to bar an estate tail. (1 Prest. Conv. 4, 5.) For these purposes a fine was effectual without proclamations (3 Prest. Abst. 133); because it was sufficient for these purposes that the parties should be bound

inter se by estoppel, there being no need to have recourse to the peculiar properties of a fine levied under the statutes 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, or to the doctrine of non-claim; and, at common law, even after the Statute of Non-claim, 34 Edw. 3, c. 16, a fine bound the parties themselves, including the married woman, by estoppel. For the same reason, a recovery was for these purposes effectual, although it was suffered without a proper tenant to the *præcipe*. The separate examination of married women arose from the provision of the statute *Modus levandi fines*—"And if a woman covert be one of the parties, then she must first be examined by four of the said justices; and, if she doth not assent thereunto, the fine shall not be levied." (2 Inst. 510.) And when a married woman joined in suffering a common recovery, she was always separately examined by the practice of the Court. (Cruise, 2 Fines & Rec. 179.)

Origin of "separate examination."

Assurances by married women under the custom of London.

It may also be remarked that, by the custom of London and of many other cities and boroughs, married women might bind their real property by deed inrolled, with acknowledgment. (See, for a very similar custom of the town of Denbigh, Dy. 363 b, pl. 26.) This custom is expressly confirmed by 34 & 35 Hen. 8, c. 22; which statute remained in force until 1863. Though this custom was recognised by the statute, it did not depend upon the statute for its validity, and there is no reason to suppose that the repeal of the statute has destroyed the custom. But at the present day this form of assurance would have little practical utility. It would enable a woman, who is neither entitled in equity to her separate use, nor entitled as a *feme sole* under the Married Women's Property Act, 1882, to alienate or charge lands situate in the City of London, without obtaining the concurrence of her husband, which would be necessary to the validity of any assurance made by virtue of the Fines and Recoveries Act.

CHAPTER XXVIII.

OF A FEOFFMENT.

A FEOFFMENT, the most venerable of assurances, survives to this day, but is now little used. It is believed that certain old corporate bodies still retain, at all events to some extent, their ancient habit of conveying by feoffment. The present writer, not many years ago, was concerned in drawing a power of attorney to deliver seisin. It is the only assurance (not being matter of record, as a fine or recovery) by which, at common law, legal estates of freehold in possession can be conveyed to a person having no subsisting interest in the land and no privity with the person making the assurance. It consists simply and solely in the livery of the seisin; and some phrases in common use, which seem to imply a distinction between the feoffment and the livery, are so far incorrect.

Function of feoffments at common law.

Under the following special circumstances the immediate freehold might at common law be acquired without livery of seisin and without any assurance of record:—

In what cases the immediate freehold might pass without livery.

(1) The tenant of the immediate freehold might surrender to the immediate remainderman or reversioner. (Co. Litt. 50 a.) Before the Statute of Frauds, the surrender might have been effected by mere parol, without any writing. (*Ibid.* 338 a.) By 8 & 9 Vict. c. 106, s. 3, a surrender of any estate of freehold is void at law unless made by deed.

(2) The immediate remainderman or reversioner, upon a term of years, or a tenancy at will, might release by deed to the tenant for years, or at will. (Co. Litt. 50 a.)

(3) An exchange might be made, without livery of seisin, of lands held for a freehold in possession, all the exchanged lands being situate in the same county. And before the Statute of Frauds, such exchange might have been by

mere parol. (Litt. sect. 62.) A deed is now necessary. (See 8 & 9 Vict. c. 106, s. 3.)

4) Partition between coparceners might be effected without livery. (Doct. & Stu. 17th ed. p. 23.) For example, by drawing of lots. (Litt. sect. 246.) A deed is now necessary. (See 8 & 9 Vict. c. 106, s. 3.)

(5) Lands or tenements which are appurtenant to an office, would pass in possession on a grant by deed of the office. (Co. Litt. 49 a; Shep. T. 90.)

(6) Similarly of lands or tenements which are appurtenant to a corrody. (Co. Litt. 49 a.)

The last two instances are not, strictly speaking, examples of a conveyance of the freehold in the lands, which passes only as appurtenant to the subject of the grant.

Lord Coke adds, as further examples, assignment of dower *ad ostium ecclesiæ*, or otherwise (meaning also dower *ex assensu patris*), and the surrender of customary freeholds. (Co. Litt. 49 a.) But though the assignment of dower forthwith gave the wife an indefeasible claim, this can hardly be called an immediate claim, and still less can the assignment be said to have vested in her an immediate freehold; and as to customary freeholds, the opinion that these are properly freeholds must now be regarded as quite exploded. (*Vide supra*, p. 27.)

Usage of the word.

Any livery of the seisin for an estate of freehold is commonly styled a feoffment; but in strict propriety the word, being equivalent to *donatio feodi*, denotes livery for a fee or estate of inheritance. (Co. Litt. 9 a.) Since estates of mere freehold in possession will at common law pass by livery of seisin as well as estates of inheritance in possession, it was convenient, when feoffments were in common use, to have only a single name to denote the appropriate assurance.

Livery of seisin is divided into livery *in deed*, and livery *in law*.

Requisites to livery in deed.

Livery in deed (or actual livery) is made *upon* the land itself, and in the absence* of every person, other than the feoffor or

* It seems to have been held in *Metteforde's case*, Dy. 362 b, pl. 20, that the presence on the land of the reversioner, if he raises no objection, would not, at

feoffors, having any lawful estate and possession in the thing whereof livery is made. (Shep. T. 213.) But a lessee for *years* may be present, if assenting to the livery; and the livery is good if made in his absence without his assent. (Co. Litt. 48 b.) The absent lessee must not leave behind him any servant, or other representative. Otherwise the livery is void, even though such servant should assent. (Rol. Abr. *Feoffment*, L, 15. See also Dy. 363 a, pl. 22.) Indifferent persons, having and claiming no estate or possession, nor representing anyone who does, may be present. (*Doe* v. *Taylor*, 5 B. & Ad. 575.)

The ceremony of livery in deed.

It seems that the ceremony in which livery in deed consists may be merely the utterance by the feoffor of express words, unaccompanied by any action, declaring a present intent that the feoffee shall immediately have the seisin; but in practice the utterance of appropriate words was commonly accompanied by "the delivery of anything upon the land in the name of seisin of that land, though it be nothing concerning the land." (Co. Litt. 48 a.) Words to signify the intent are necessary to perfect the livery of seisin, though they are not necessary to perfect the delivery of a deed. (Co. Litt. 49 b.) An exception to this rule seems to exist in the case of a dumb feoffor. (Co. Litt. 42 b, 43 a.)

Remarks upon *Sharp's case*.

The reports of *Sharp's Case*, 6 Rep. 26, Cro. Eliz. 482, Serj. Moore's Rep. 458, if they all refer to the same case, are utterly at variance.* According to Moore, a certain man, intending to deliver seisin of a house and land, merely (*solement*)

common law, have hindered a tenant for years from making a (tortious) feoffment. But it is not clear that this was more than *obiter dictum*, for it was doubted in that case whether the effect of the particular deed of feoffment was not to convey the term itself previously to the livery of seisin, in which case the livery would, it is conceived, have been void. The authority of the Touchstone is express, that the persons above referred to in the text, if present, must actually join in the livery; in which case they would of course be counted among the feoffors. Preston, in his additions to the text of Sheppard, seems to support this view, as to freeholders; but he remarks that a mere assent by lessees for years is sufficient.

* Lord Coke's editors have during several generations treated these reports as referring all to the same case; nor is there any reason, from the facts stated, to doubt the identity of the case in Croke with that of Lord Coke. But the dates are different. At the end of Croke's report is the following remark:—"Note, that Serjeant Glanvil said, such a case was between *Swan* and *Sparks*." In Moore the name is *Sharpe* v. *Swaine*, and it may perhaps be plausibly conjectured that the case in Moore is that to which Glanvil referred.

delivered a deed of feoffment within the house; which was held to be no livery of the land, but only a delivery of the deed. If this account is both correct and complete, the case would be clear and undoubted law; but Moore's account of the facts, if he is referring to the same case, is expressly contradicted by both of the other reporters. They affirm that the man who meant to make the feoffment used words which, in the apprehension of ordinary persons, would leave no doubt of his intention. Lord Coke gives the words, with peculiar minuteness of circumstance, as follows:—"Brother, I here demise unto you my house as long as I live, paying twenty pounds by the year to me, and finding me my board and washing and keeping of a horse." Croke plainly represents the case as having decided, that mere words, unaccompanied by the symbolical delivery of something, like a turf, a twig, or the ring or handle of the door of a house, are insufficient to effect livery of seisin. Towards the beginning of Lord Coke's report, which is apparently confused and certainly obscure, the reader is inclined to think that he is being told the same thing; but Lord Coke afterwards explicitly affirms that the words, *Enter into this land and enjoy it during your life*, would alone have constituted a good livery of seisin. Therefore it would seem that, according to Lord Coke, the case only decided that the word *demise* is not an apt word to make livery of seisin, even for an estate *pur autre vie;* although in a deed it is undoubtedly an apt word to make a lease for life or lives, so far as the operation of the deed is concerned.

Course to be pursued in practice.

In practice the safest course is undoubtedly to make a symbolical delivery, upon the land or in the house, of some appropriate object in the name and as a symbol of the land or house, and to accompany this act with words, desiring the feoffee to hold the land or house according to the limitations contained in the deed of feoffment, by which, under the statute 8 & 9 Vict. c. 106, hereinafter mentioned, the livery must now be evidenced.

Livery by, or to, an attorney.

Feoffor or feoffee may both, or either, be represented by their respective attorneys, duly appointed for the purpose by deed. (Co. Litt. 48 b.) A parol attorney will not suffice. An infant may appoint an attorney to *receive* livery of seisin on his behalf;

and this is an exception from the general rule, that an infant cannot execute a deed. (1 Prest. Abst. 293.)

Livery in law differs in its ceremony from livery in deed only in being made *in sight of* the land instead of actually upon it. (Co. Litt. 48 b.) It does not require the same absence of hostile claimants; and it was in fact seldom used unless the presence on the land of such claimants made livery in deed dangerous or impossible; though such danger is not essential to the validity of livery in law. (Co. Litt. 253 a.) **Livery in law.**

But livery in law passes no estate without entry by the feoffee during the joint lives of himself and the feoffor. Such entry must be actual entry (entry in deed), unless the feoffee be hindered from making actual entry by fear of violence; in which case he may make an *entry in law* instead, by approaching as near as he dares, and in words claiming the land to be his. Under such circumstances, an entry in law will operate to perfect the livery, and cause the estate to pass, in the like manner as entry by deed. (Litt. sect. 419; *Townsend* v. *Ash*, 3 Atk. 336, at p. 340.) **When it passes the seisin.**

The law imagines such an intimate union between different parts of the same county (Finch, Law, p. 79) that livery of seisin of one parcel suffices to give seisin of all other parcels in the same county, to which the livery relates. (Litt. sect. 61.) **Parcels in the same county.**

At common law, a feoffment made by an infant, *proprià manu* and not by attorney, is voidable only and not void; and the age of the infant is not material. (13 Vin. Abr. 174 = *Feoffment*, E, pl. 1, 2; 1 Prest. Abst. 323.) **Feoffments by infants.**

By the custom of the county of Kent, an infant, whether male or female, not being below the age of fifteen years, seised in fee simple in possession of lands subject to the custom of gavelkind, may indefeasibly alienate them by feoffment; at all events for valuable consideration. (Rob. Gav. pp. 248, 249.) It is doubtful whether, in the absence of consideration, such a feoffment would be unavoidable. (*Ibid.* pp. 276, 277.) It would not be void; because if it should fail as a customary **Customary feoffments by infants.**

feoffment, it would be in the position of a feoffment made by an infant at common law. The alienation is not necessarily for a fee simple, but may be for a fee tail, or for life. (Rob. Gav. p. 280.) But (independently of 8 & 9 Vict. c. 106, s. 4) a feoffment made by an infant could not have any tortious operation. (Rob. Gav. pp. 279, 280.) It is doubtful whether this custom extends to lands taken by the infant otherwise than by descent. (*Ibid.* pp. 277, 278, and p. 279, note *c.*) But infants so rarely take lands by purchase, that the question is of little practical importance. The custom is construed strictly; and therefore the infant must deliver seisin *propriâ manu*, and not by attorney. (*Ibid.* p. 249.) The Statute of Frauds, s. 1, whereby no feoffment can convey any greater estate than a tenancy at will, unless it is "put in writing," signed by the feoffor or his agent thereunto lawfully authorized by writing, seems to apply to feoffments made under a custom by an infant. But such feoffments are expressly excepted from 8 & 9 Vict. c. 106, s. 3, whereby feoffments in general are declared to be void unless evidenced by deed.

This custom is not necessarily confined to gavelkind lands in Kent. It might lawfully be alleged to exist in manors and boroughs elsewhere. (Rob. Gav. p. 287. See Co. Litt. 110 b, and Harg. n. 2 thereon.) In respect to lands not within the county of Kent, its existence would require to be specially proved.

Livery *secundum formam cartæ.*

At common law, a deed was necessary only in the case of a feoffment made to a corporation aggregate, and not being a gift in frankalmoigne. (Co. Litt. 94 b.) But though the livery was itself the feoffment, and nothing else than livery was generally necessary to a perfect feoffment, yet the limitation of the estate or estates for which the livery was made might be contained in a deed, executed for the purpose previously to the feoffment; and if the livery were afterwards made without any formal limitation, but expressed to be made with reference and according to the deed (*secundum formam*, or *formam et effectum, cartæ*), such livery would enure to effect the limitations contained in the deed.

If livery of seisin be made *secundum formam cartæ*, the opera-

tion of the livery, so far as regards the *quantum* of the estate passed by it, is controlled by the import of the deed; so that (1) if the deed should limit an estate which cannot pass, or which cannot be created, by livery of seisin, as a remainder *de novo* in fee simple expectant upon the death of the feoffor, or a term of years followed by no remainder of freehold, the livery is void; (2) if the livery purport to be *secundum formam cartæ*, but the feoffor should also verbally limit an estate which is less than the estate limited in the deed, the estate limited in the deed passes by the livery. (Co. Litt. 48 a, b; *ibid.* 222 b.)

How the charter controls the livery.

An estate of freehold having any *quantum*, in remainder expectant upon a term of years created at the same time, may be passed by making livery of seisin to that intent to the termor for years. (Litt. sect. 60.) But such livery cannot be made after the termor has entered into possession by virtue of his term; it being, of course, understood that his entry upon the land for the purpose of receiving livery, does not, being made with that intent, amount to an entry into possession so as to defeat the livery. (Co. Litt. 49 b.) And for this purpose the livery must be livery in deed, not livery in law; which latter can only be made to the person who is himself to take the freehold. (*Ibid.*)

Since the Statute of Frauds, 29 Car. 2, c. 3, s. 1, no feoffment can convey any greater estate than a tenancy at will, unless it is "put in writing," signed by the feoffor or his agent thereunto lawfully authorized in writing.

Statutory requisites. Writing.

By the 8 & 9 Vict. c. 106, s. 3, a feoffment, other than a feoffment made under a custom by an infant, is void unless evidenced by deed.

Deed.

Except in special cases by virtue of special enactments, a deed does not need signing in addition to sealing and delivery. (*Taunton* v. *Pepler*, Madd. & Geld. 166; *Cherry* v. *Heming*, 4 Exch. 631.) Blackstone seems to have thought that the above-cited section of the Statute of Frauds had made signing necessary to every deed by which any estate or interest specified in that section is granted or evidenced. (2 Bl. Com. 306.) But he seems for a moment to have forgotten, that all transactions not by deed are in contemplation of law by parol. The statute

Signing not essential to the deed's validity.

seems only to aim at restricting (in the specified cases) the latitude of parol transactions, forbidding parol transactions by mere words, permitting parol transactions by written words without deed. There is not any reason to believe that the "many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury," against which the statute is aimed, were common in transactions by deed; or that, if they had been, the remedy applied by the statute would have been efficacious in such cases; or that the makers of the statute thought it would. Transactions by deed seem wholly outside the language, as well as the intention, of the statute. (See Prest. Shep. T. 256, note 24; 3 Prest. Abst. 61.)

It is therefore conceived that there is nothing in the Statute of Frauds to make signing necessary to the deeds contemplated in 8 & 9 Vict. c. 106, s. 3. Such deeds ought nevertheless to be signed in practice.

Tortious operation of a feoffment at common law.

By the common law, any person having actual possession (not necessarily actual seisin, of lands, could, by a feoffment, give *to* any person other than the person having the next or the immediate estate of freehold in the lands,* an immediate estate of freehold, having any *quantum*. If the feoffor was actually seised, and the estate which passed by the feoffment was no greater than the estate of the feoffor, the feoffment took effect rightfully; but if the feoffor was not actually seised, or if the estate which passed by the feoffment was greater than his estate,† the feoffment was styled a tortious feoffment, and was said to take effect by wrong.

In accordance with the maxim that *no one can qualify his own wrong*, a tortious feoffment devested the whole fee simple out of the rightful owner or owners. It does not follow that the tortious feoffment was necessarily a feoffment in fee simple;

* If the feoffment had been made to the person lawfully seised in possession, it would have been void; as purporting to give him, by means of a wrongful title, what he already had by rightful title. If it had been made to the next remainderman, it would have operated rightfully as a surrender of the estate of the feoffor, thus accelerating the remainder. (1 Prest. Abst. 353.)

† "Where a greater estate passeth by livery than the particular tenant may lawfully make." (Co. Litt. 251 a.) Upon the whole subject of disseisin by tortious feoffment, see Litt. sect. 611, and Butl. n. 1, thereon.

and it might in fact be for a less estate. In such a case, the feoffee took only the less estate, but the whole fee simple was devested out of the rightful owner or owners, and such part of it as was not disposed of by the feoffment became vested in the feoffor by way of a tortious reversion upon the tortious particular estate created by the feoffment.

Now prevented by statute.

The tortious operation of feoffments made after 1st October, 1845, is prevented by 8 & 9 Vict. c. 106, s. 4.

Who could make a tortious feoffment.

The possession of a termor for years, or tenant at will, or by sufferance, sufficed to enable the termor, or tenant, to make a tortious feoffment; and thus to convey an immediate estate of freehold which fulfilled many of the purposes of a rightful estate, though it afforded no defence against the title of the rightful owner. Upon the subject generally, and especially upon the case of *Doe* v. *Horde*, Cowp. 689, 1 Burr. 60, 5 Bro. P. C. 247, in which Lord Mansfield, striving after an unattainable equity (τὸ μὴ γενέσθαι δυνατὸν διζήμενος), threw the law into much confusion, see Butl. n. 1 on Co. Litt. 330 b.

Its effect, when not made by tenant in tail actually seised.

If a tortious feoffment was made by any person other than a tenant in tail actually seised, the person rightfully entitled (or any other person acting in his name, even though without his assent) might at common law destroy the tortious estate of the feoffee by mere entry (Co. Litt. 258 a); but if the feoffee's heir had succeeded by inheritance before entry made, the heir's estate could not be affected by entry, and the rightful claimant was put to his action. (Litt. sect. 385.) His entry was technically said to be tolled by descent cast. Entry was tolled by a descent cast in fee tail (when the disseisor made a gift in tail) as well as in fee simple. (*Ibid.* sect. 386.) But on the extinction of the entail by failure of issue, the entry was revived against the remainderman or reversioner. (Co. Litt. 238 b.)

Entry tolled.

Entry now not tolled by descent.

The 3 & 4 Will. 4, c. 27, s. 39, enacts that no descent cast after 31st December, 1833, shall toll any right of entry. This enactment made the learning of descents cast, and also of continual claim whereby rights of entry might be protected therefrom, equally obsolete.

Discontinuance.

A feoffment made by a tenant in tail actually seised, operated as a discontinuance of the estate tail, and devested all remainders, and the reversion, expectant upon it, unless they were vested in

the king. (*Stone* v. *Newman*, Cro. Car. 427, at p. 428.) By such discontinuance the persons entitled under the entail, and in remainder or reversion, were barred of their right of entry, and respectively put to their action as the only means to enforce their claims.

The learning relating to discontinuance, though obsolete in respect to the common practice, is still sometimes of practical importance. In 1884 a case was litigated in the House of Lords in which the validity of a claim partly depended upon the properties at common law of a tortious fee simple, which had been gained by a discontinuance effected in the preceding century, by a feoffment made by the survivor of two joint donees in special tail.

Right of action refers to real action.

In all cases where the right of entry was tolled or barred, the needful action to recover the seisin was a real action. An action of ejectment (*ejectione firmæ*) would not suffice. (2 Prest. Abst. 328.)

There were two degrees of remoteness in a right of action, the first being said to be founded upon a *right of possession*, and the second being styled a *mere right;* and there were two kinds of real actions corresponding thereto, *possessory actions*, grounded upon writs styled *writs of entry*, and *droitural actions*, grounded upon writs styled *writs of right*. A right of possession might be turned to a mere right, either by suffering such a time to elapse as would be a bar to a writ of entry, or by suffering adverse judgment by default in an action on such a writ. (See on this subject, Butl. n. 1 on Co. Litt. 239 a.) But the discontinuance of an estate tail by the tortious feoffment of the tenant in tail in possession, forthwith turned the right of the issue in tail to a mere right, without passing through any intermediate stages.

Feoffment as assurance under Statute of Uses.

The feoffment hitherto contemplated, is a strictly common law conveyance. But uses capable of being executed by the statute may be declared upon the seisin of the feoffee; and in such case the conveyance takes effect partly by the common law and partly by the statute.

CHAPTER XXIX.

OF A RELEASE.

A RELEASE has several modes of operation; but of these only two, strictly speaking, entitle it to be styled an assurance of lands—(1) its operation by way of enlarging an estate (*enlarger l'estate*), when a remainderman or reversioner releases his estate to a particular tenant; and (2) its operation by way of passing an estate (*mitter l'estate*), when one joint tenant releases his estate to another. The following remarks will be confined to releases by way of enlargement.

Who may take a release *enlarger l'estate.*

A mere *interesse termini* does not qualify the person entitled thereto (the intended lessee) to take a release (Litt. sect. 459); for there does not exist a reversion upon an *interesse termini*. (Co. Litt. 270 a.) The lessee must be in possession either by actual entry or by force of a bargain and sale under the Statute of Uses. But he remains qualified to take a release, if he parts with the possession to a sub-lessee of his own; and a termor for years in remainder upon another term which is an interest in possession, is sufficiently qualified to take a release, without being or having been in possession, by the possession of the termor under the prior term. (*Ibid.*) There is a sufficient reversion upon a tenancy at will to qualify the tenant to take a release (Litt. sect. 460); but not upon a tenancy at sufferance, which is a bare possession without any privity of estate. (Co. Litt. 270 b.) The general principle which sums up and explains the foregoing observations is this, that the releasee must have in him a vested estate to which the releasor is privy.

Its effect.

By a release in fee, the estate of the particular tenant is enlarged, and, if his estate is only a chattel interest, his mere possession is turned to an actual seisin (Litt. sect. 546); and uses capable of being executed by the statute may be declared upon the seisin so acquired.

Lease and release.

Upon the foregoing proposition was founded the efficacy of the now obsolete conveyance by lease and release. The lease was a bargain and sale for a year, which, being made by a person having the seisin in him, raised a use capable of being executed without transmutation of the seisin, whereby the bargainee acquired a lease for a year, and was constructively in possession under the statute without actual entry. Thereby he became qualified at common law to acquire the seisin in fee by means of a release of the reversion.

New uses capable of being executed by the statute might be declared upon the seisin so transferred in fee to the releasee.

Thus this kind of assurance might serve, and was in fact employed to serve, two different purposes, accordingly as the use was declared to the releasee himself, or as new uses were declared upon his seisin. (1) If the use was declared to the releasee himself, the latter remained seised; and, since he was seised to his own use, he was in by the common law, and not by the statute. In this case the lease and release operated merely as a *conveyance*, and its operation is divisible into two stages: first, the bargain and sale for a year, which took effect by the statute; and, secondly, the release, which took effect by the common law. (2) If new uses were declared upon the seisin of the releasee, these (if otherwise valid) were executed by the statute, whereby the seisin was devested out of the releasee to serve the uses. In this case the lease and release might operate as a *settlement;* and its operation was obviously divisible into three stages, of which the first and third were due to the statute, and the second was due to the common law.

CHAPTER XXX.

OF A STATUTORY GRANT.

All hereditaments now lie in grant.

THE several stages by which the form of assurance by lease and release was superseded, have been traced above; the last of them being the 8 & 9 Vict. c. 106, s. 2, which enacts that, after 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.

Relation between the premisses of a deed and the *habendum*.

The disuse in practice of feoffments is connected with some remarkable modifications in the practical effect of conveyances, so far as regards the relation between the premisses and the *habendum*. The following statement of the chief points which require to be noticed in this relation may be found useful, since very confused, and even erroneous, ideas are now current upon the subject.

A careful examination of the authorities seems to establish the following propositions:—

(1) The *habendum* may enlarge an estate expressly contained in the premisses, and capable of taking effect, but may not abridge or make void any such estate. (Co. Litt. 299 a; *Lilley* v. *Whitney*, Dy. 272 a, pl. 30; *Carter* v. *Madgwick*, 3 Lev. 339; *Germain* v. *Orchard*, 1 Salk. 346, 3 Salk. 222; *Goodtitle* v. *Gibbs*, 5 B. & C. 709; *Boddington* v. *Robinson*, L. R. 10 Exch. 270.)

True criterion, whether *habendum* may control premisses.

It follows from the above-stated proposition, that the *habendum* cannot abridge any estate contained in the premisses, unless such estate either is not expressly contained, or else is not capable of taking effect. And it accordingly appears, from an examination of the authorities, that all cases in which the *habendum* has been held

to abridge an estate in the premisses, are referable to one or the other of these two heads, and are divisible into two classes, which are summed up in the two next following propositions.

(2) Where an estate in the premisses arises, not expressly, but by mere implication, an express estate in the *habendum*, if repugnant, may abridge the implication of the premisses. (*Buckler's Case*, 2 Rep. 55; *Hogg* v. *Cross*, Cro. Eliz. 254; Co. Litt. 183 a; *ibid.* 190 b.)

The language in which this rule is often referred to, as being an example of repugnancy between the *habendum* and the premisses, and of the controlling of the latter by the former, is not very happily chosen, though it is sanctioned by high authority. For, since it is not only unnecessary, but even improper, that the premisses should contain any mention of the estate to be granted (Shep. T. 75), there is no reason, under such circumstances as above mentioned, to suppose that any estate by implication arises by the bare mention of a grantee in the premisses. In such cases, instead of saying that the implied estate in the premisses is controlled by the express estate in the *habendum*, we should more properly say that there is no estate in the premisses at all.

(3) Where, under the old law, an estate was contained in the premisses, which could not take effect without livery of seisin, and such livery was not duly made, then, if an estate was contained in the *habendum* which could take effect without livery of seisin, the latter estate would take effect by mere delivery of the deed, though the former would not. (*Baldwin's Case*, 2 Rep. 23.)

In these cases also there is little propriety in speaking of the *habendum* as controlling the premisses. It would be more correct to say that two limitations are contained in the same deed, one of which (that in the premisses) is void, while the other (that in the *habendum*) is capable of taking effect.

It follows that, strictly speaking, the *habendum* does

not control the premisses in any of the foregoing cases, because either there is no estate in the premisses, or else the estate in the premisses is already void, independently of the operation of the *habendum*.

Moreover, the introduction into common practice of assurances by which an immediate freehold can be conveyed without making livery of seisin, such as a bargain and sale inrolled, a lease and release, or a grant under 8 & 9 Vict. c. 106, has rendered impossible, in modern practice, any such seeming conflict between the *habendum* and the premisses as appears in the cases referred to under proposition (3); because in modern assurances all estates whatsoever can pass by delivery of the deed without livery of seisin.

The conclusion seems to follow, that in modern assurances the *habendum*, though it may enlarge, yet may not abridge, any estate previously contained in the premisses, unless the estate in the premisses arises by mere implication. In strict propriety of speech it should rather be said that the *habendum* only seems to abridge, when in fact there is no estate in the premisses at all.

(4) In certain cases the estates limited in the premisses and the *habendum* respectively, though not precisely identical, are so far *ejusdem generis*, that it is held to be compatible with the due intent of both, that a modification introduced by the *habendum* shall be permitted to take effect.

Thus, there is, for the present purpose, no repugnancy between a fee simple and a fee tail, both being of inheritance. If the former be limited in the premisses, and the latter in the *habendum*, the grantee undoubtedly takes a fee tail; but whether he also takes a remainder thereupon in fee simple is doubtful. (Co. Litt. 21 a; Harg. n. 2 thereon, and cases there referred to.) Some further evidence of intention, beyond the bare limitation in the premisses, is perhaps necessary to pass the remainder also.

So, also, when there is a grant in the premisses to

several grantees, such as, if standing by itself, would import a joint tenancy, there is no repugnancy if the limitation in the *habendum* should be such as to import a tenancy in common; and in such a case the effect of the *habendum* is to sever the joint tenancy. (Co. Litt. 183 b. See also Dy. 361 a, pl. 8.)

And if the grant in the premisses be to a man and his heirs, *habendum* to him and his heirs *during a life or* lives, there is no repugnancy, and the grantee takes only an estate *pur autre vie*. (2 Prest. Est. 4.)

And if a lessor, being seised of the reversion in fee simple upon a lease for life, makes a lease which purports to be *of the reversion*, *habendum* the *land* for twenty-one years, there is no repugnancy, and the lease creates a good term in the land for twenty-one years after the death of the lessee for life; the *habendum* showing that the assurance was intended to be a lease of the lands and not a grant of the reversion. (*Throgmorton* v. *Tracey*, Dy. 124 b.) The significance of this distinction lies in the fact, that in that case the lessee for life had died without having attorned to the grantee, and at that day, the attornment of the person having the particular estate, during the lives of the grantor and grantee, was necessary to the validity of a grant of the reversion. (Litt. sect. 551, and Lord Coke's comment.) But now, by 4 Ann. c. 16, s. 9, the grant of a reversion is good without the attornment of the tenant.

Grant, as assurance under Statute of Uses.

The remarks at p. 332, *supra*, as to the declaration of uses in assurances by lease and release, whether to the releasee himself, or upon his seisin, are exactly applicable to the case of a grantee by virtue of the 8 & 9 Vict. c. 106. A modern conveyance by way of grant may therefore, to the same extent and for the same reasons, serve either as a conveyance or as a settlement; and it is the assurance now most commonly employed to serve those purposes.

CHAPTER XXXI.

OF ASSURANCES BY WAY OF USE WITHOUT TRANSMUTATION OF POSSESSION.

It was a principle of equity, that the courts of equity would not enforce a mere voluntary use, as against any person who was not himself a volunteer; though, if an owner parted with the seisin and declared a voluntary use upon the seisin in the hands of his feoffee, equity would enforce the voluntary use as against the voluntary seisin of the feoffee. Voluntary uses, therefore, did not interfere with the legal rights of any person whose seisin did not depend upon a voluntary title. It follows that no effectual use could, without consideration, be raised in favour of another person upon the seisin of a person who also had in him the beneficial title, while he retained the seisin in himself; because he could exercise all his legal rights unfettered by the voluntary use.

By what considerations a use may be raised.

The considerations which sufficed to raise a use upon the seisin of a person who was also beneficially entitled, were (1) valuable consideration, (2) the consideration of relationship by blood or marriage. A use so raised was capable of being executed by the statute. In the first case, the transaction, styled a *bargain and sale*, was complete upon payment of the purchase-money, and nothing further was absolutely necessary in order that the use might effectually be raised. In the second case, the consideration was such that it was no consideration at all, unless and until the person to be affected by it elected to regard it as such; and therefore a formal declaration of his intention was necessary. This was usually done by a covenant, whence came the assurance briefly styled a *covenant to stand seised*. But a covenant was not necessary: a declaration of intention made by deed poll would serve equally well. (Shep. T. 508.) A mere parol promise was not sufficient. (*Collard* v.

Collard, Poph. 47, Serj. Moore's Rep. 687, 2 Anders. 64; *Page* v. *Moulton*, Dy. 296 a, pl. 22.)

A *bonâ fide* valuable consideration was necessary to the raising of a use by means of a bargain and sale operating as a conveyance, and a *bonâ fide* relationship of blood or marriage was necessary to a covenant to stand seised.

The fact that the bargain and sale for a year, which was the foundation of the conveyance by lease and release, was expressed to be made for a nominal consideration that was in fact never paid, does not form any exception to the rule, that a bargain and sale must, in order to take effect as a bargain and sale, be made for valuable consideration. The lease did not operate as a conveyance until it was perfected by the release; and both stages formed together one transaction. The acknowledgment of the fictitious consideration in the lease operated as an estoppel at law, and by the release, even though it were made for no consideration, the assurance became complete at law, without any need to resort to the equitable doctrine of bargains and sales. This assurance is therefore no exception to the rule, because it did not take effect by the means contemplated by the rule. Though the lease is commonly styled a "bargain and sale," yet it was not in fact a bargain and sale in the same sense as the bargains and sales which are within the meaning of the Statute of Inrolments.

Statute of Inrolments.

After the passing of the Statute of Uses, the use which was raised upon the seisin of the vendor in favour of a purchaser who had paid his purchase-money, was forthwith executed by the statute and became a legal estate; and thus, by means of mere parol bargains and sales made for valuable consideration, it was possible, until the passing of the statute next hereinafter mentioned, for vendors and purchasers to convey and acquire the freehold and the inheritance in lands with no more ceremony than was needed for the purchase of a chattel. The 27 Hen. 8, c. 16, called the Statute of Inrolments, enacted, that from the 31st July, 1536, no manors, lands, tenements or other hereditaments, should pass from one to another, whereby any estate of *inheritance or freehold* should take effect in any person, or any use thereof to be made by reason only of any bargain and sale

thereof, except the same bargain and sale be made by writing, indented, sealed, and inrolled as therein mentioned.

It will be observed that the statute did not extend to interests less than a freehold; and therefore that the bargain and sale for a year, which was used as the foundation of the release in assurances by lease and release, needed no inrolment.

Bargain and sale: its disadvantages.

Bargains and sales for valuable consideration, if duly inrolled, are still perfectly valid, and perhaps they are still sometimes employed. But they can serve only to convey, not to settle, legal estates; for since the bargainee comes in only by a use, any further use limited thereupon will be a use limited upon a use, which is not capable of being executed by the statute, and will exist only as a trust. For the same reason, this kind of assurance does not permit the insertion of powers intended to take effect at law by declaration of use.

Covenant to stand seised.

The covenant to stand seised has long been quite obsolete. Its only function was to carry into effect family settlements; and as the frame of these became more complex, usually comprising trustees to preserve contingent remainders, covenants to stand seised were necessarily abandoned, because the trustees were not within the consideration, and could, therefore, take no estate by virtue of the covenant.

This insuperable obstacle does not now exist, since trustees to preserve contingent remainders are no longer needed; but there is no motive for reviving the defunct assurance.

An important part has been played by the doctrine of covenants to stand seised, in the developement of the maxim, *Benigne faciendæ sunt interpretationes cartarum*. It has long been the practice of the courts to allow an assurance, technically invalid in the shape in which it was intended by the parties to operate, to take effect as a covenant to stand seised, when the circumstances of the parties are such that the last-mentioned assurance would have been valid. Thus an assurance of lease and release made by a man to his brother, which was void as a lease and release because it purported to convey a freehold *in futuro*, was held good as a covenant to stand seised. (*Roe* v.

Tranmarr, Willes, 682, 2 Wils. 75.) It is sometimes necessary at the present day to have recourse to this doctrine in order to defend a title.

The scope of the foregoing remarks has been confined to matters preliminary to the investigation in detail of the conveyances and settlements which are permitted by the law. This subject introduces the theory and practice of modern conveyancing; which the writer may perhaps be enabled to discuss upon a future occasion.

APPENDIX.

THE CASE OF

WITHAM *v.* VANE,

[1879.—W.—No. 104]

BEFORE THE

House of Lords,

26th, 27th April, 1883.

A covenant by a purchaser of lands in fee simple, contained in the conveyance made to him by the vendor, that the purchaser, his heirs, appointees, and assigns, will from time to time and at all times pay, or cause to be paid, to the vendor, his heirs, executors, administrators, or assigns, the sum of sixpence for every chaldron of coals wrought and gotten out of the lands conveyed, and which shall be shipped for sale, is not restricted to refer only to coal put on shipboard by or on behalf of the colliery proprietor for the purpose of subsequent sale by him, but refers also to all coal sold by or on behalf of the colliery proprietor for the purpose of shipment and actually shipped.

Such covenant is restricted to refer only to coals actually put on board ship, and cannot, by reason of subsequent changes in the customary modes of carrying coal, be extended to refer also to other modes of carrying coal, such as by railway transport, which have grown into use since the date of the deed containing the covenant.

Such a covenant confers upon the vendor no interest in the land conveyed, and it is accordingly not open to any objection on the ground of remoteness, or as tending to create a perpetuity.

In default of production of a counterpart of the conveyance executed by the purchaser, after due search made for such counterpart by the representatives of the vendor, secondary evidence of the execution of the conveyance by the purchaser is admissible; and a recital of the covenant contained in a subsequent indenture executed by the respective representatives in title of the vendor and the purchaser, and a like recital contained in a private act of parliament obtained by the representatives of the purchaser, is sufficient evidence, in addition to the antecedent probability of the matter, to prove the execution of the conveyance by the purchaser.

Held also, by the Court of Appeal, that the mere fact that the land conveyed had been enjoyed under the title obtained by the conveyance, and that the con-

veyance purported to contain such a covenant, would not, in the absence of proof of the execution of the conveyance by the purchaser, suffice to render the purchaser and his representatives liable, either at law or in equity, to perform the covenant.

THE principal question in this case turned upon the validity, and the construction, of certain stipulations, contained in certain articles of agreement in writing, dated 24th June, 1823, and in a conveyance, dated 21st January, 1824, made between the predecessors in title of the plaintiffs, who were also the appellants, and the predecessors in title of certain of the defendants, who were also the respondents, respectively.

By the said articles of agreement, dated 24th June, 1823, and made between George Silvertop of the one part, and William Harry Earl of Darlington (afterwards Duke of Cleveland) of the other part, the said G. Silvertop agreed to sell and the said earl agreed to purchase the manor of Hutton Henry and other hereditaments in the County of Durham, containing in the whole 3,200 acres or thereabouts, at the price of 42,000*l.* And it was thereby agreed that, in the conveyance of the said hereditaments to the said earl, there should be inserted a covenant from the said earl that he, his heirs and assigns, should from time to time pay to the said G. Silvertop, his heirs, executors, administrators, or assigns, the sum of sixpence for each chaldron of coals of the Newcastle measure, which should be wrought and gotten out of the said hereditaments and which should be shipped for sale.

The said articles of agreement were signed by the said G. Silvertop and the said earl respectively.

In the conveyance of the said hereditaments to the said earl, made in pursuance of the said articles of agreement, and dated 21st January, 1824, was contained a covenant in the following words:—

"And the said William Harry Earl of Darlington doth here-
"by, for himself his heirs executors and administrators, covenant
"with the said George Silvertop, his heirs executors administra-
"tors and assigns, that he, the said William Harry Earl of
"Darlington, his heirs appointees and assigns, shall and will
"from time to time and at all times hereafter pay or cause to
"be paid unto the said George Silvertop, his heirs executors

" administrators or assigns, the sum of sixpence of lawful money " current in Great Britain, for each and every chaldron of coals " of the Newcastle measure which shall be wrought and gotten " from and out of the said hereditaments hereby released or " otherwise assured or intended so to be, and which shall be " shipped for sale."

The lands to which the present action related were comprised in the above-stated conveyance of 21st January, 1824, and are by Lord Selborne in his judgment styled the Hart Estate. The representatives in title of the Earl of Darlington had parted with all his estate in the said lands before the commencement of the present action.

The plaintiffs, as the representatives in title of the said G. Silvertop, were entitled to the benefit of the said covenant, and certain of the defendants, as the representatives of the said earl, were liable to the burden of the said covenant, if and so far as the same was a valid and subsisting covenant, for the purpose of imposing a valid and subsisting liability upon the said earl and his representatives in title.

The original of the indenture of 21st January, 1824, which was produced by the defendants, was duly executed by all parties whose concurrence was necessary to pass the estate agreed to be sold to the purchaser, the Earl of Darlington, but it was not executed by the purchaser. Diligent search had been made by the plaintiffs for the counterpart supposed to have been executed by the purchaser and delivered to the vendor; but no such counterpart was found. From the number of the seals affixed to the original, and from certain pencil marks written against them, it appeared to have been contemplated that the original would be executed by the purchaser.

The purchaser, the Earl of Darlington, was created Duke of Cleveland in the year 1841, and died on 29th January, 1842. In the judgments delivered he is commonly named by his later title.

By an indenture dated 1st March, 1843, to which the persons then entitled to the benefit of the covenant, and the persons then liable to its burden, were both parties, certain arrangements, not material to be stated, were made in relation to the premises; and the said indenture contained a full recital of the above-

stated conveyance of 21st January, 1824, in the course of which recital it was stated to be the fact, that the said Duke of Cleveland had, by the said conveyance, entered into the covenant above specified.

The indenture of 1st March, 1843, was executed by the persons then entitled to the benefit, and by the persons then liable to the burden of the said covenant, upon the hypothesis of its validity.

In a private Act of Parliament passed in the year 1846, to amend a prior Act which had been passed for the purpose of vesting certain powers of management in the trustees of the will of the Duke of Cleveland, was contained a recital that, upon the purchase of the said hereditaments in the year 1824, the said duke had entered into a covenant in the terms above specified. The Act which contained this recital was promoted by the persons who, as representing the said duke, would then have been liable to the burden of the said covenant upon the hypothesis of its validity.

The principal questions which arose for discussion, and which are dealt with in the judgments, are as follows:—

(1.) Whether there was any, or sufficient, evidence that the purchaser, the Duke of Cleveland, had executed the covenant.

(2.) Whether, on the hypothesis that the covenant had never been executed by the purchaser, it was nevertheless binding upon his personal representatives.

(3.) Whether, supposing the covenant to be binding on the purchaser, the words, "coals . . . which shall be . . . gotten from and out of the said hereditaments and which shall be shipped for sale," must be restricted to refer only to coals shipped by the colliery proprietor for the purpose of being subsequently sold by him or on his behalf.

(4.) Whether in the said covenant the word "shipped" must be restricted to refer solely to coals actually put on board ship, or whether it might be extended to refer also to other modes of carrying coal which had come into common usage since the execution of the covenant, and

had to a considerable extent taken the place of the then existing custom of shipment.

(5.) Whether, supposing the covenant to be otherwise valid and binding upon the purchaser, it was not void, as tending to a perpetuity.

The original action came on for trial before Mr. Justice Fry, on 5th June, 1880. The trial lasted until 7th June, when judgment was given for the plaintiffs. The learned judge seems to have held that, partly by reason of the undoubted execution of the articles of agreement of 24th June, 1823, and partly by reason of the fact that the lands had been enjoyed under the title acquired by the conveyance of 21st January, 1824, it was not material to enquire whether the purchaser had in fact executed the conveyance, and that the covenant was, upon either hypothesis, binding upon his estate. He also held, that the covenant was not void as tending to create a perpetuity; that it referred only to coals put on board ship by or on behalf of the colliery proprietor for the purpose of subsequent sale by him; and that it could not be extended to refer to any other method of carrying coals than by shipment.

Omitting the formal parts, and the part relating to costs, the order dated 7th June, 1880, drawn up in pursuance of Mr. Justice Fry's judgment, is as follows:—

"This Court doth declare that according to the true con-
" struction of the covenant in the deed of the 21st January,
" 1824, in the pleadings mentioned 'coal shipped for sale'
" means coal put on shipboard by or on behalf of the colliery
" proprietor for the purpose of subsequent sale by him and such
" coal only And doth order and adjudge that an inquiry be
" made having regard to the declaration aforesaid what number of
" chaldrons of coal of the Newcastle measure wrought and gotten
" out of the Hutton Henry Colliery have been shipped for sale."

And certain of the defendants who were the executors of the Duke of Cleveland's will were ordered to pay to certain of the plaintiffs, in whom was vested the power to give a discharge for moneys becoming payable under the covenant, out of the assets of the said duke, sixpence for every such chaldron as should be certified to have been so shipped for sale as aforesaid; with

certain further directions in case the last-mentioned plaintiffs should not admit assets for the purpose.

The plaintiffs appealed from the above-stated order. The appeal was heard by the Lords Justices James, Baggallay, and Lush. Their lordships appear to have held, that there was no evidence that the Duke of Cleveland had in fact executed the covenant; that upon that hypothesis, the covenant was not binding upon him, although he had held the lands under the title acquired by the conveyance in which the covenant purported to be contained; and that the only remedy of the plaintiffs was, to have brought an action (before such action had become barred by the Statutes of Limitation) for the breach of the agreement, contained in the articles of agreement of 24th June, 1823, to execute such a covenant. They accordingly reversed the judgment of Mr. Justice Fry, and ordered the action to be dismissed out of Court.

The plaintiffs appealed from this decision to the House of Lords. The appeal was heard on 26th, 27th April, 1883, by the Lord Chancellor, Lord Blackburn, Lord Bramwell, and Lord Fitzgerald.

The counsel for the appellants were Sir Farrer Herschell, S. G., Mr. Cookson, Q.C., and Mr. Dunning, and Mr. W. B. Trethowan.

The counsel for the respondents were Mr. Whitehorne, Q.C., Mr. Wolstenholme, and Mr. Smart.

At the conclusion of the arguments for the respondents, their lordships retired for consultation; and upon their return to the House, the following judgments (*a*) were delivered:—

Earl of Selborne, L.C.: judgment.

LORD CHANCELLOR: My lords, I quite feel that this covenant is one of a somewhat unusual character, and that its operation may be in some respects inconvenient to the persons interested in the estate of the covenantor. Neither, however, of those reasons can be sufficient to prevent your lordships from giving to it its proper legal effect. They explain, perhaps, the pertinacity with which this action appears to have been defended, and I must, for my own part, say that, but for the respect which I feel for every opinion, even when contrary to my own, of the learned judges of the Court of Appeal, I should have thought

(*a*) Such parts of the judgments as refer only to costs have been omitted.

Earl of Selborne, L. C.: judgment.

that there was no question in this case susceptible of serious difficulty or argument, excepting the question upon the construction of the covenant. The Court of Appeal, however, thought that the existence of the covenant was not sufficiently proved, and because they thought so it is impossible for your lordships not to regard that as a question requiring to be seriously examined.

Now the matter stands in this way. There is a sale of land, not merely for a certain sum of money to be paid down at the time, but also in consideration partly of this peculiar covenant, under which, though the vendor, as I understand its effect and operation, retains no interest in the land, yet he may in a certain event which is provided for, the event of the working of the minerals under that land which he has sold, have a right to receive sums which may be of considerable amount and value from the purchaser or his representatives. My lords, this transaction was to be carried into effect by an indenture, and we have produced to us an indenture executed by the vendor, and coming out of the purchaser's possession, which, upon the face of it, shows plainly on what terms and under what contract the purchaser, out of whose possession that deed comes, held and was in enjoyment of the land. The only question is whether the covenant was executed under seal by the covenantor; but that there was a contract for such a covenant, of importance and value to the vendor, is perfectly clear, because, as I say, the title deed, coming out of the purchaser's muniment room, contains upon the face of it the terms of that covenant, about which, therefore, if the covenantor was ever liable, there can be no controversy whatever.

Now what would be the natural course of such a transaction? Would it be that one part only of the indenture would be executed by both parties and left in the hands of the purchaser? Can your lordships suppose that such a transaction could naturally or reasonably take that course; that the person who was to have the benefit of this covenant would not have in his power and in his own hands the covenant of which he was to have the benefit, and that the deed which alone could prove it would be delivered by him, acting by a solicitor, in a matter of business, over to the purchaser? Your lordships will find it stated in

Earl of Selborne, L. C.: judgment.

the books of law, and it is a familiar proposition, that when an indenture contains provisions in which each party retains and will have a continuing interest, one part of that is delivered by each party to the other. An indenture bi-partite is supposed not only to be between two parties, but to be in two parts; and the natural, proper, and ordinary course would be that each party would have a part executed by the other party which would secure to him his own interest. It may be, and I think it is, so stated by Mr. Hargrave (*a*), in a note to the passage about indentures in Coke upon Littleton, that the more modern practice has been for all the parts to be executed by all the parties; and it seems in this particular case that the deed produced from the muniment room of the purchaser was prepared by the solicitor in such a form as to show that he contemplated that it would be executed by both the parties; and the fact that, on the face of it, it shows some preparation for execution by the Earl of Darlington, who was the covenantor, as well as by Mr. Witham, and those who joined with him in conveying as vendors, has been relied upon in the Court of Appeal as evidence that no other execution by the earl, the covenantor, can have been contemplated, except the execution of that particular piece of parchment, which the earl did not execute.

My lords, it certainly seems to me that that ground is most insufficient for the argument which is founded upon it. I cannot but believe that if the earl had executed the part which he retained in his own possession, the necessity for the execution of a counterpart would have been exactly the same, and that the business would not have proceeded in the natural and ordinary course of such a transaction unless a counterpart retained by the vendors had been executed by the earl. All reason, presumption, and probability are in favour of it. I do not say that *à priori* reason, presumption, or probability would have been by *itself* enough if there were no evidence of any kind, properly receivable, that there was in point of fact a covenant duly entered into and executed by the earl.

But, my lords, there is, as it seems to me, upon that subject

(*a*) Not Hargrave, but Butler, n. 3 on Co. Litt. 229 a. See also 2 Bl. Com. 296.

Earl of Selborne, L. C.: judgment.

evidence, not only admissible, but of the strongest possible character, and such that it is difficult to believe that its effect could have been rebutted without very strong and clear evidence indeed of a kind not at all likely to have been producible, and which certainly has not been produced in this case. What, my lords, is the evidence to which I refer? It is this: an admission, under seal, by the duke's legal and personal representatives and devisees of this particular purchased estate, that he did enter into such a covenant. That admission your lordships find in the deed (*a*) bearing date the 1st March, 1843, which is made, observe, my lords, between the persons then representing the vendors entitled to the benefit of this covenant of the first and second parts, and between certain persons described as "the trustees and executors " named in and by the last will and testament of the Duke of "Cleveland" (for the earl had become the first Duke of Cleveland) " deceased, of the third part;" and they were in point of fact devisees in trust of that particular property, and also executors.

The substance of that agreement is for the reduction upon certain terms of the payments which might be exigible under this very covenant, a reduction which would operate for the benefit, both of the persons interested in the estate, if they were in any way liable for those payments, and in that way for the benefit of the trustees of the duke as devisees in trust, and also for the benefit of the duke's personal estate, as bound by the covenant, by reducing the amount which might be exigible against the estate under the covenant if it should come into force. Therefore, the executors of the duke, as such, were directly interested in the arrangements made by this deed. All the parties interested are brought together—the covenantees, the Withams, the devisees in trust of the estate to which the covenant related, and the personal representatives of the duke, who was personally bound by the covenant, and it is a bargain concerning the subject-matter of the covenant. In that deed it is solemnly recited, under the seals of all those persons, that " by an indenture of release, dated on or about the 21st of " January, 1824" (being evidently the very same deed of which a part executed by the vendors was produced in evidence in the

(*a*) See p. 343, *ante*.

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case), "William Harry, Duke of Cleveland" (his later title—he had been Earl of Darlington at the time he executed it), "did, in and by the indenture now in recital, for himself, his "heirs executors and administrators, covenant and agree with "and to George Silvertop, his heirs executors administrators "and assigns, that the said William Harry, Duke of Cleveland, "his heirs appointees and assigns, would from time to time and "at all times thereafter pay or cause to be paid to the said "George Silvertop, his heirs executors administrators or "assigns, the sum of sixpence for each and every chaldron of "coals of the Newcastle measure, which should be wrought and "gotten from and out of the said hereditaments and premises "thereby released or otherwise assured, and which should be "shipped for sale." Then there was a further covenant as to accounts, and so on, exactly corresponding with the terms of the covenant embodied in the part executed by the Withams, which is now produced from the muniment room of the duke.

My lords, can there be better secondary evidence than this distinct admission under the seals of the parties bound that the duke did covenant? Can those who now represent the estate as it was then represented by the parties to that admission be heard now to say that he did not covenant merely because they produce from the duke's muniment room a part of this indenture which the duke did not execute, of which, although, no doubt, it was contemplated by the solicitors that he should execute it, his execution would have been wholly immaterial, if there were, as, unless this recital is untrue, there must have been, an execution of a counterpart of that indenture by the duke, which counterpart would naturally be in the custody of the vendors or those representing them. The two parts of an indenture, when there are two parts, are one and the same indenture. It is not that there are two deeds or two indentures; there is one indenture, but that is in two parts. Therefore the reason and probability of the case, and the ordinary course of business in such a case, agree with the express admission on record of these parties, an admission made upon the footing of the existence of such a covenant and for the purpose of varying the effect of it by contract for valuable consideration.

That, my lords, has superadded to it a subsequent Act of

Parliament obtained at the request, as it recites, of the representatives of the duke and containing exactly the same recital of the existence of such a covenant. Earl of Selborne, L. C.: judgment.

The remarkable thing, which I am unable after the argument we have heard to explain to my own mind, is that in the judgment of the Court of Appeal, in which the learned judges agreed in holding that there was a failure of evidence to prove the existence of such a covenant, there is not the least allusion to this secondary evidence, to these admissions in the one case by Act of Parliament, and in the other under seal, no attention apparently having been directed to the question whether they are not enough under the circumstances to prove the existence of such a covenant, and to repel any presumption if otherwise there could have been a presumption, that because the signature of the duke was intended to have been placed upon the part which he produces and is not there, therefore it could not have been put upon any other part which is not produced. Of course, my lords, the non-production of the counterpart bearing the signature of the duke, and his seal, was a thing to be accounted for, but it is not in dispute that there is abundantly sufficient evidence of search and that it has not been found in the proper custody. Under those circumstances, my lords, I cannot entertain the least particle of doubt that we must proceed upon the footing that these recitals are true. Of the terms of the covenant there is no doubt or question for they are set forth in both the recitals and we have the counterpart of the deed before us. The only question, therefore, is, what is the effect of such a covenant if it is assumed to have been duly executed by the duke?

Now, my lords, some ingenious arguments were offered to your lordships which I own, notwithstanding the great ingenuity with which they were urged, I had difficulty in following, to the effect that this action is improperly brought, supposing that there was such a covenant; that the primary liability was upon the holders for the time being of the Hart Estate, and that, if so, the contract was objectionable on the ground of perpetuity, or some other grounds, into the details of which I really do not think it necessary to enter. My lords, if there had been, as between the owners of the estate and the general representatives of the covenantor, the relations which are described by the words "primary and secondary liability," which may very possibly

Earl of Selborne, L. C.: judgment.

have been the case by means of contracts between the purchasers of the estate, when it was sold by the duke's representatives and those who sold it, it appears to me that it would not have had the least effect upon the present question. It would have been *res inter alios*, a matter with which the covenantees had nothing to do. The only remedies they could enforce were remedies against the persons liable to them and, in my opinion, upon the construction of this covenant, it is a mere personal covenant, binding only and only purporting to bind the covenantor, his heirs, executors and administrators. Whatever be the thing which it covenants to be done, it cannot be in any way whatever a reservation of an interest in the land, nor is it susceptible of any construction which would postpone the liability under the covenant until some application or attempt had been made to obtain payment against somebody else, which in this case has not been done. There is not a word in the covenant to justify such an idea. Reference was made to the case of *Hemingway* v. *Fernandes* (*a*), a case of lease between a lessor and a lessee, in which a certain covenant to make certain payments was held by the Vice-Chancellor of England to run with the land. But this is not a covenant which by any possibility can run with the land upon the alienation out and out in fee simple of the estate, nor has any authority whatever been cited to your lordships in favour of such a proposition. I am not sure what the result might have been if it had been so. Most certainly it is not so, and therefore we need not trouble our minds with it.

With regard to the question of perpetuity, as far as I can make out it was put wholly on these alternative grounds by Mr. Whitehorne, upon the ground with which I have already dealt, that it was in the nature of a reservation of an interest in land to arise at an indefinite time. As I think that it was not a reservation of any interest in land, the foundation of that argument fails. Being a mere personal covenant Mr. Whitehorne contended that it was a covenant to pay money in an event which might only arise at a distant period of time; that can make no difference. In point of fact the case I mentioned during the argument of the Clive Fund of *Walsh* v. *The Secretary of State for India* (*b*) is a remarkable illustration of

(*a*) 13 Sim. 228; 12 L. J. Ch. 130; 7 Jur. 888. (*b*) 10 H. L. C. 367.

the inapplicability of the doctrine of perpetuity upon any such grounds; for the covenant there of the East India Company was this (the covenant being made (*a*) in the year 1756), that "if they should at any time thereafter by any means otherwise than by the fate of war be dispossessed of their territorial acquisitions in Bengal, and the revenues arising thereby, so that the jaghire granted to Lord Clive should cease to be paid to him or his assigns, or in case they should at any time before 1784 cease to employ and maintain in their immediate pay and service a military force in the East Indies," they should pay him this money. Then "if after the year 1784 it should so happen that the Directors and Company should have no military force in their actual pay or service in the East Indies" certain other payments should be made. Of course that was a thing which might not have happened for centuries. In point of fact it did not happen till more than a century or about a century after the date of the covenant—a very long time indeed after the year 1784. But although I remember perfectly well that this notion of perpetuity was thrown out tentatively in the arguments in that case, it met with no countenance—the money was held to be payable. Earl of Selborne, L. C.: judgment.

The other argument was as to the inconvenience of tying up to a certain extent the administration of the duke's estate. All I can say upon that is, that that was a matter which the Earl of Darlington, who entered into this covenant, should have thought of at the time when it was entered into. The convenience of persons beneficially interested in the estate before the Court cannot prevent the covenant from having its proper legal effect.

That brings me, my lords, to the question which alone really appears to me to be a serious question in this case, namely, the construction of the covenant; and as to that, the large construction contended for by the learned counsel for the appellants, that "shipped" is to be a flexible term which would be applicable to every mode of transport, and not only to the transportation of coal by sea, appeared to all your lordships to be one which on ordinary principles of construction we could not adopt. Therefore that must be taken to be excluded. Shipment, we think, means shipment, and the covenant must be construed so.

(*a*) The date, according to the report, is 1770.

Earl of Selborne, L. C.: judgment.

But then the question is, what is the meaning of the words "Which shall be shipped for sale?" Mr. Justice Fry thought that they meant, and he has so expressed it in his Order (*b*), "Put on shipboard by or on behalf of the colliery proprietor for the purpose of subsequent sale by him." My lords, that, I believe, appears to your lordships, and certainly it does to me, to be too narrow a construction. On the other hand, if the two circumstances of shipment and sale happened *quocunque modo* and without any connection between them, with which the colliery proprietor was concerned, I think it would be too large and wide and too unreasonable a construction to bring every such case as that within the covenant. To me it seems that it was happily put in argument by Mr. Cookson when he said "sale" means for "sale purposes;" it must be shipped, and it must be for sale purposes. As far as reason is concerned, I cannot conceive why it should make any difference whether the sale was negotiated or made before or after the shipment, in point of time, so long as a sale and shipment are brought together in the transaction of the colliery proprietor. My lords, I believe that that opinion commends itself to your lordships generally, and that you will be prepared to agree to the restoration of Mr. Justice Fry's Order, with this modification, which I will now read to your lordships. I shall propose that these words be omitted from Mr. Justice Fry's Order (*b*), "Put on shipboard by or on behalf of the colliery proprietor for the purpose of subsequent sale by him," and that instead of them these words should be introduced, "Sold by or on behalf of the colliery proprietor for the purpose of shipment and actually shipped, and coal shipped by or on behalf of the colliery proprietor for the purpose of sale by him or on his account." It will run, therefore, thus, "This Court doth declare that, according to the true construction of the covenant in the deed of the 21st January, 1824, in the pleadings mentioned, 'coal shipped for sale' means coal sold by or on behalf of the colliery proprietor for the purpose of shipment and actually shipped, and coal shipped by or on behalf of the colliery proprietor for the purpose of sale by

(*b*) See p. 345, *ante*.

him or on his account, and such coal only." That excludes, of course, coal which is the subject of land transport as distinct from sea transport. And, my lords, I am bound to say that, while I think the words will fairly bear that construction, and the reason of the thing strongly points to it, I am glad that it should be possible to put upon this instrument a construction which will in some degree mitigate the severity and inconvenience of its operation upon the persons representing the duke, because, if they have taken proper care of themselves in their transactions with those to whom they have sold the estate (and of course it is their own fault if they have not), they will have an indemnity against that which they may have to pay, which, of course, the present appellants have nothing to do with, and the proprietors for the time being of the estate will not have it made useless to them, because it will only be necessary for them to dispose of their coal in a different way; for example, to send it to other markets by railway, and then they will be free from any burden under this covenant.

Earl of Selborne, L. C.: judgment.

Lord Blackburn: judgment.

Lord Blackburn: My lords, I entirely agree in what the noble and learned Lord Chancellor has proposed, and I will only say a few words upon the one point on which the Court of Appeal went. Mr. Justice Fry had decided that in his opinion the counterpart of this indenture (as there was undoubtedly an indenture at the time of sale) was sufficiently proved, and that in equity it would be enforceable just as if it had been produced, because the estate had been enjoyed under it. The Court of Appeal thought that the mere fact of the estate being enjoyed under an indenture which only one side had executed, would not in equity have that effect. Upon that point I say nothing whatever, as it is not a point upon which we have now to decide. They further said what amounts to stating that although this was an indenture which in the old times, no doubt, would have been an indenture, of which by terms expressed it was meant that there should be two counterparts originally cut in a wavy line to separate them from each other, one of which should be executed by one party and given to the other, and the other executed by the second party and given to the first, in order that each might keep one counterpart for his own,—that although

Lord Blackburn: judgment.

that would be the meaning of the word "indenture," yet in modern times it has very often been the case that an indenture has been drawn up in one part and one part only. There is no doubt that that is true; and, consequently, the mere fact that this was an indenture does not by itself raise a presumption that there was another counterpart, or at least not so strong a presumption as would be necessary for acting upon. But I think, looking at the nature of the transaction, where there was a very considerable estate, and where there was a very important covenant such as this,—I do not know what its pecuniary value amounts to, but from the great degree of force and vehemence with which the defence has been conducted I suppose that the sum is large,—I say that I think, where there was such an important transaction as that, the legal advisers of the vendor of this estate would have been excessively to blame and guilty of the grossest negligence if they had not seen that the Earl of Darlington affixed his seal to the covenant, and they would also have been guilty of very great negligence if they had not seen that that seal of the Earl of Darlington which was affixed to the covenant was put upon the counterpart which would be kept by them for their client. No doubt, they have been guilty of very great negligence; and although all this tends very much to make it antecedently probable that there would be a counterpart executed and sealed, I do not very much differ from the Court of Appeal (indeed I may go further than that, and say that I agree with the Court of Appeal) that if it had stood on that and that only, there would have been no reason to say that the parties had not been guilty of gross negligence. That they were guilty of negligence afterwards in losing the counterpart if there ever was one, is perfectly plain; and I cannot say that they were not guilty of some negligence previously: they may have been.

But then (and it is singular enough that the Court of Appeal do not seem to have noticed it) we are not without evidence that the counterpart did exist, quite independently of this presumption. The Earl of Darlington, who had become Duke of Cleveland, died in 1842. Immediately after his death his devisees in trust were brought into contact with those who represented the original covenantees, who at that time, if there

was a counterpart, ought to have had it in their possession; and as early as 1843 the devisees in trust of the Duke of Cleveland came to make an agreement. They discussed and considered the effect of this covenant, and made an agreement relating to this covenant, and in 1843 they executed that agreement. There was an argument which I could not really understand (I am afraid that I may be doing it injustice because I could never apprehend it) to this effect—it was said that if the Duke of Cleveland's trustees in 1843 admitted under their hand and seal that there was a counterpart existing, and that it had been sealed by the late duke, it would not be evidence against the trustees of the Duke of Cleveland, the devisees, in this action, for some reason which I was not able to understand. They are not the same identical people, because we know that Henry, Lord Brougham, is dead, and that William, Lord Brougham, seems to have become one of the trustees since; but they represent the same trustees—they represent the same estate; and why it should not have been admissible evidence I do not understand. That fact being admitted, it seems to me, for reasons which I need not repeat over again, as strong and as clear as can be. They admit that "the said William Harry, Duke of Cleveland, did, in and by the indenture now in recital, for himself, his heirs, executors, and administrators, covenant and agree," and then the document proceeds to recite the very covenant which is now in question, that being the very indenture. It was endeavoured to be argued that we should understand that to mean, not that he had covenanted by it, but that they thought he was bound as much as if he had covenanted by it. I cannot say that I put that construction upon the words. I think the conclusion to be drawn from them is that in 1843, the indenture, the counterpart, with his hand and seal to it, did exist, and that the trustees knew that it was in existence, and that they made this agreement under their hand and seal, admitting that it was existing. And that is a great deal strengthened when you come to what took place a few years afterwards, in 1846, when a private Act of Parliament was passed, promoted for this purpose, to which the trustees were consenting parties; indeed, they were the very parties who promoted it. In that private Act there are certain statements:

Lord Blackburn: judgment.

Lord Blackburn: judgment.

amongst other things, they put this as a recital, that "the said William Harry, Duke of Cleveland, on the purchase of the Hutton Henry and Hurworth Estates, in the year 1824, covenanted to pay to the said George Silvertop, his heirs, executors, administrators and assigns," and then they proceed to state this covenant, which, I may observe, was one of those things for the purpose of dealing with which that Act was obtained in respect of the very property in question.

Now what I cannot understand is why all this should not be good evidence to lead to a conclusion as to the existence of the counterpart. In the case of the private Act it is further strengthened by this consideration, that there was every reason why the committee should require proof of these allegations upon which they were asked to proceed: and therefore the statement that the Duke of Cleveland had covenanted is much stronger evidence there than even the prior one; because it is just possible, though it is not very likely, that the trustees of the Duke of Cleveland might have taken it for granted that a counterpart was existing in 1843, but it is hardly probable that both the trustees of the Duke of Cleveland and a committee of the House of Lords should take it for granted that there was one if it really did not exist.

I can, therefore, come to no other conclusion than that the counterpart containing this covenant was actually executed and did really exist, but has been lost, I know not how, but by some negligence probably; and that being so, secondary evidence can be given. The question therefore comes, What was the effect of that covenant? First, I may say, that several points were put which I do not think it necessary to deal with, because I think that they have been sufficiently dealt with by the noble and learned lord on the woolsack. It was said that this covenant of the Duke of Cleveland, or rather of the Earl of Darlington as he then was, is not enforceable now. I am afraid to deal with these points, because I did not understand what they were; but I can only say that they were none of them such as I could advise your lordships to give effect to. I think that this covenant is just as much enforceable as any other promise or contract made to pay a sum of money. It is said that that would be a perpetuity. It is not a perpetuity in the sense in which the law

aims at perpetuities. The person who is entitled to receive this sixpence a chaldron, whatever the amount may be, and the person who has now got the estates in question, or the Duke of Cleveland's personal representatives, or whoever it is, can come to an agreement for releasing it. Those who are entitled to it would sell it readily enough if a sufficient consideration were offered for it. The parties could settle the matter in that way: it is no perpetuity. Lord Blackburn: judgment.

Then it is said (and it is very true) that it was very unwise in the Duke of Cleveland to enter into an agreement which would have the effect of binding him, and his estate after his death, to pay a sum of money which would go on to be payable until the coals, in fact, were worked out, which might be a vast number of years hence: and so it was; it was not a wise bargain, but that was his fault. If he has brought an inconvenience upon himself and his estate, there it is, and those who have the estate must take the consequences resulting from it.

The only remaining question is, What is the meaning of the contract? It is not very artificially drawn, but we have to construe a contract made in 1824 in relation to the working of a colliery in Durham, having regard to the words which are used in that contract, but putting a sense upon those words which they will bear, as used with reference to the subject-matter; that is to say, with reference to the subject as to which the parties were contracting. I think, therefore, that evidence is admissible to show what was the ordinary course of things in 1824 (not as they are now) in the district round these coal-pits, or in the county of Durham (you may say generally) where these coal-pits lie, and what was the ordinary course of dealing there; and having that before us, we have then to see what these words mean when used by the parties contracting with regard to that state of things. It is quite true that this colliery was not then opened: it was not opened till some time afterwards; but still the parties were thinking of the ordinary state of business, and what was ordinarily done in coal-pits and coal mines in that neighbourhood when they were at work; and the words used in the contract are, I think, to be understood in the sense in which such words would be understood when used with reference to such a course of dealing.

Lord Blackburn: judgment.

Now there is not much evidence here as to what was done in 1824; but it is quite intelligible to this extent. Coals which were raised in that district at that time were sometimes sold to country customers, people who came to carry them away in carts —a good deal of the coal was disposed of in this way: and more was carried down to the river side and put on board keels—those keels took the coals up the river to inland places where they were wanted; some was taken down the river in keels and sold to people along the banks of the river for local consumption. But the bulk of the coal was ultimately sold to be consumed by people to whom it was sent by sea; and the mode in which it was the common custom to sell it is explained in this way—the coals were sent down by the coal proprietor in trams or keels, and the fitter, who seems to have been a sort of intermediate broker between the persons who had sent their ships there to be loaded and the owner of the coal or the occupier of the collieries, made an arrangement by which so much of these coals was put on board a ship, and the ship sailed off, and the person who had the ship paid for the coals. I do not understand that the fitter was liable to the person who sold the coals, but the purchaser paid for them to the colliery owner through the fitter: that was the ordinary course of business.

Then we come to this covenant. The covenant is that the Earl of Darlington "shall pay sixpence for every chaldron of coals of the Newcastle measure which shall be wrought and gotten from" the premises, and which shall be "shipped for sale." What does "shipped for sale" mean? Mr. Justice Fry put a very limited meaning upon it. He thought it meant this, namely, where the coal-owner himself hired a ship and put the coals on board the ship, and sent away the ship with the coals to be sold somewhere else, they being the coals of the coal-owner at the time, which were shipped for the purpose and with the object that they should be sold. Mr. Justice Fry thought that, though the coals were sold for the purpose and with the object of their being shipped, and however clear it might be that they were afterwards shipped, yet if the sale passed the property in the coals from the coal proprietor before they were put on board the ship, it could not be a "shipment for sale" within the meaning of the contract. I have come to a different conclusion. I have

found some difficulty in exactly seeing how the words should be used to express the idea which I have; but I think that those words which the Lord Chancellor has read, come as accurately as any words can be brought to do it, to express what we mean. If the coal proprietor has sold the coals—that is to say, has entered into a contract for the sale of the coals, which contract for sale is such as to show, as a matter of fact, the intention of that sale to be that the goods shall be put on board ship—though it would not literally be the case that they were shipped for sale, but literally it would rather be that they were sold before shipment, yet I think that that is within the meaning of the contract, and that what the parties meant was that upon such sales as those the sixpence per chaldron should be paid. That goes beyond what Mr. Justice Fry allowed. Lord Blackburn: judgment.

My lords, there was a contention, which was not much urged, but an attempt was made to say that, inasmuch as the coals which are now sent up by railway were within the mischief (if I may use the phrase) that the parties had in view, it was reasonable and just and *cy-près* to say, "If you are to pay sixpence for every chaldron which comes to London by sea you should pay sixpence for every chaldron which comes to London by railway." That might be said, but whether it would be just or would not be just as a *cy-près* doctrine, it is to my mind perfectly clear that you cannot construe the words used in the covenant of 1824 as meaning anything of the sort. In asking for that, those who do so ask for a great deal too much.

Lord Bramwell: judgment.

Lord Bramwell: My lords, I concur in what has been proposed to your lordships. We are invited to say that there was no counterpart of the conveyance of 1824 executed by Lord Darlington. Now I feel as certain that a counterpart was executed by him, as one can feel of anything not depending upon one's own knowledge or the direct testimony of persons who declare that they have seen and know the thing of their own knowledge and whom one believes. I am satisfied that it was executed; and it strikes me as rather alarming that a doubt should be entertained upon the matter, because the same difficulty might be made in every case in which a man had granted a lease and taken a counterpart signed by the tenant. I am

Lord Bramwell: judgment.

very much inclined to think that, without further evidence, there would be enough to show that there was this indenture in separate parts. I do not rely very much upon its being stated to be an "indenture." In point of law, no doubt, that means that it is in more than one part, that is the technical signification; but I should not attach much value to that point. However, it is stated to be an indenture; but it is an instrument which purports to contain a covenant by Lord Darlington. He takes the estate which is conveyed to him by it; it was his duty, under his contract, to execute a counterpart. It was to the interest of the grantor of the estate that that counterpart should be executed; and I strongly incline to think that that alone would suffice to make us believe in the existence of the counterpart: it would be good *primâ facie* evidence of it, and the legitimate conclusion, if it stood there, would be, not that the instrument had not been executed, but that it had been executed, and had been lost. But when, in addition to that, the other evidence is considered, it seems to me to be absolutely clear that the counterpart was executed.

Now, if I thought that I was differing from that most able and, in my opinion, most consummate judge, the late Lord Justice James, I should have great doubt whether I was not in the wrong; but it is a singular thing that if his judgment is examined, it will be found that he assumes that the counterpart was not executed. He gives no reason; but he seems to assume it, and his judgment is directed to the consideration whether, if that was so, any relief could be given to the plaintiffs. With respect to the other two learned Lords Justices, I say, with great submission to them, that I cannot agree with their reasoning; and, in particular, that matter which was relied on, that the part of the instrument executed by the grantors was not executed by Lord Darlington, seems to me almost to furnish an argument that a counterpart was executed by him, because, if it was his duty to execute some instrument, and he did not execute that part, the legitimate conclusion would be that he had executed a counterpart. I am satisfied, therefore, that that counterpart was executed.

The only other matter on which I think it necessary to say anything, the other ingenious difficulties having been dealt with

by the noble and learned lords who have preceded me, is upon the words "coals shipped for sale." Now, upon that subject I concur in the opinion which has been expressed. If I entertained anything like a grave doubt upon the matter, I should yield it to the opinion of the three noble and learned lords who have also heard this case and who entertain none, but really the only misgiving which I have about it is whether "shipped for sale" would include the case of coals that were sold to the consumer, and as it were put on board the consumer's ship, or possibly taken away by the purchaser for the purpose of consumption. But I must say that I think the good sense of the thing is the other way—the good sense of the thing is to make the royalty payable upon every thing that is got from the colliery and taken and shipped. It may be said that that gives no meaning to the words "for sale." Possibly it does not give any meaning to them—but it continually happens, I believe, that the argument, that you must find some meaning for every word, is unduly pressed. It may possibly have been in the minds of those who drew this instrument, that if coals were put on board a ship somehow or other, not in anticipation of a sale by the person to whom they were delivered or for any other object, a royalty should not be payable upon them—but I do not think we are driven to hold contrary to what, as I said before, is the good sense of the thing. I think it is contrary to the good sense of the thing, that where goods have been sold and put on board the ship, or the chartered ship of the purchaser for his own consumption, that is not within the clause. It must always be borne in mind that at the time when this instrument was executed, except as regards the coal sold locally and in the neighbourhood, there could be no contemplation that there would be any extensive sale, or indeed any other sale than that which resulted in a shipment.

Lord Bramwell: judgment.

I concur therefore in the opinions which have been expressed to your lordships.

Lord Fitzgerald: judgment.

Lord Fitzgerald: My lords, I also concur in the judgment which has been pronounced by the noble and learned Lord Chancellor, and in the reasons which he has given for that judgment. I have only to say a word on two points of the

Lord Fitzgerald: judgment.

case. The first is upon the question of evidence. I confess that when I read the judgments, having before me the Appendix, and read also the documents in the Appendix, I was amazed at the statements in the judgments. First, Mr. Justice Fry expressed himself as having come to the conclusion that a counterpart had been executed by the then Earl of Darlington, but solely upon the ground that it was his duty to do so, and that enjoyment under the deed which was produced had been consistent with the execution of such a covenant as that now in question. It is not necessary for me to offer any opinion on the point whether, if it rested on the supposed duty alone, the learned judge was right in coming to that conclusion. But when we come to the evidence in this case, there is clear evidence of the existence and execution of the counterpart. Not only is there evidence, but it is evidence which is proper to be considered as conclusive by way of estoppel. In reference to contracts, I have always understood that, even as to a deed, a verbal admission by a party of its existence, and of the contents of that deed, will be amply sufficient when once you account for the non-production of the original. You have an admission of it, and you have evidence showing its contents. But this case does not rest upon a verbal statement. There is an instrument of 1843, proceeding upon the basis of a solemn statement that the earl had executed a deed containing this covenant, and that deed is not the one which is produced, for that is not executed by him. That is further confirmed by the Act of Parliament; and I feel that I can only account for the course which has been pursued in this case, and for the judgments, by supposing that this evidence was not brought to the attention of the Court. For instance, we find one of the Lords Justices saying this:—"As regards the question of fact, there does not appear to me any evidence at all which would lead to the inference that the duke executed a counterpart of that deed of 1824. That a counterpart was in contemplation hardly appears to be a probability. There is nothing upon the face of the deed to suggest that a counterpart was intended." And, again, another of the Lords Justices says this:—"With great deference to the learned judge" (Mr. Justice Fry) "that is a matter in which I cannot coincide with him. Whether the

duke did execute that deed or not is, to my mind, a question of fact" (as it is) "to be tried like every other question of fact, namely, upon the evidence, and if there is no evidence which leads to the reasonable conclusion that he did so, we ought to find that that fact is not proved." I can only account for these judgments by supposing that this evidence was never brought before the learned judges in some shape or other. It is observable (I called attention to this yesterday) that there is not a single expression on the face of any one of these judgments dealing either with the instrument of 1843 or with the Act of Parliament. Therefore it seems to me perfectly clear, that there is ample and persuasive proof of the execution by the earl of the counterpart of the deed containing the covenant. Lord Fitzgerald: judgment.

My lords, there is only one other thing upon which I wish to observe, and that is as to the construction of this covenant. I confess that it appears to me to be a question of some difficulty. No doubt upon the literal construction, if you were to adhere to the very letter of the contract, the construction given to it by Mr. Justice Fry is quite correct. But I apprehend that we are not to adhere to the literal construction of the covenant if it will work injustice, and above all if that literal construction will enable the covenantor to evade a liability which he is under. Now, upon looking to the covenant itself, it is open to a fair and liberal interpretation which will work no injustice, but which will give to each party fairly their rights. No doubt it will make it possible for the covenant in one sense to be inoperative, because the present colliery proprietors, if they find it for their interest, in place of shipping the coal to send it all to London by rail, may evade the payment of the sixpence per chaldron.

My lords, we must interpret this covenant by the state of things at the time when it was entered into. That was at a time when there were no railways; and it is in evidence that there were then three modes of disposing of the coal, namely, by land sale, by river sale, and by sea sale. Land sale is out of the question here, because it is admitted that the covenant does not attach upon a mere land sale, that is to say, a sale in the interior. That it might attach upon a river sale is plain, because, according to the evidence, the river sale is sometimes conducted in this

Lord Fitzgerald: judgment.

way: the coal having been sold is put on board a keel, or river boat, and is loaded into a certain ship, so that it is obvious that the coal taken by the river boat may come under the designation of a shipment by sea. Therefore the covenant would appear to us to attach to certain river sales, that is, where there is a contract for sale in connection with a delivery by river on board keels which carry the coal to a certain ship. And so it would equally apply to the case of a sea sale, which I understand to be a sale of coal to be shipped and sent by sea away from the place. Once shipped for sale we have nothing more to do with it—it is not necessary to inquire further; for the interpretation which the Lord Chancellor has given, and in which I entirely join, is this, that where there is a sale of coal to be shipped, to be sent by sea, where it is brought into connection with a contract for shipment and is actually shipped, it matters not whether there is to be afterwards a sale or not. That would embrace all the cases in which the owners of the colliery themselves shipped for sale according to the literal interpretation of the contract, and also the other cases where there was a sale or a contract for shipment, the coal being either delivered by river in the manner described, or sent down to the staith to be put on board ship, and when once that takes place we have no further inquiry to make as to what becomes of the coal.

My lords, upon these grounds I entirely concur in the judgment which has been delivered by the Lord Chancellor.

Order.

The Order appealed from was reversed; and it was declared that the Order of Mr. Justice Fry should be varied by omitting the words "put on shipboard by or on behalf of the colliery proprietor for the purpose of subsequent sale by him" and substituting the words "sold by or on behalf of the colliery proprietor for the purpose of shipment, and actually shipped, and coal shipped by or on behalf of the colliery proprietor for the purpose of sale by him or on his account." And after certain declarations as to costs, the cause was remitted to the Court below.

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